132-472

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1886.**

No. 1066. ~~687~~ ~~339~~ 115

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,

*vs.*

E. A. O'NEAL, GOVERNOR, C. C. LANGDON, SECRETARY OF STATE, M. C. BURKE, AUDITOR, AND FRED. H. SMITH, TREASURER, COMPOSING THE STATE BOARD OF ASSESSMENT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

**FILED OCTOBER 4, 1886.**

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## INDEX.

| | Original. | Print. |
|---|---|---|
| Citation Caption | 1 | 1 |
| Transcript from circuit court of Montgomery county | 1 | 1 |
| Caption | 1 | 1 |
| Petition | 2 | 1 |
| Exhibit A.—Proceedings of the Board of Equalization | 15 | 6 |
| Order for certiorari | 51 | 28 |
| Writ of certiorari | 51 | 28 |
| Sheriff's return | 53 | 30 |
| Security for costs | 53 | 30 |
| Motion to quash and dismiss certiorari | 54 | 30 |
| Judgment | 61 | 33 |
| Petition for appeal and supersedeas | 62 | 34 |
| Order allowing appeal and supersedeas | 63 | 35 |
| Supersedeas bond | 64 | 35 |
| Notice of supersedeas and appeal | 67 | 37 |
| Bill of exceptions | 68 | 37 |
| Exhibit A—Motion to quash and dismiss certiorari | 70 | 38 |
| B—Agreed statement of facts | 76 | 40 |
| Clerk's certificate | 77 | 41 |

JUDD & DETWEILER, PRINTERS, WASHINGTON.

| | Original. | Print. |
|---|---|---|
| Assignment of errors | 79 | 42 |
| Joinder in error | 81 | 42 |
| Hearing and submission | 82 | 43 |
| Judgment | 82 | 43 |
| Opinion | 82 | 43 |
| Writ of error (copy) | 98 | 50 |
| Bond | 101 | 51 |
| Citation (copy) | 103 | 52 |
| Clerk's certificate | 105 | 52 |
| Writ of error (original) | 106 | 53 |
| Citation (original) | 109 | 54 |

1 Supreme Court of the State of Alabama. December Term, 1885.

TUESDAY, *December 1st*, 1885.

Be it remembered that a regular term of the supreme court of the State of Alabama was begun and holden according to law at the capitol, in the city of Montgomery, on Tuesday, the first day of December, A. D. 1885, it being the first Tuesday of the said month.

Present and presiding as judges of the said court: Hon. George W. Stone, chief justice; Hon. Henderson M. Somerville, associate justice; Hon. David Clopton, associate justice.

THE STATE OF ALABAMA, *Montgomery County:*

Be it remembered that at a term of the circuit court begun and holden for said county, at the court-house thereof, in the city of Montgomery, in said county, on the second Monday in December, it being the fourteenth day of December, in the year of our
2 Lord one thousand eight hundred and eighty-five.

Present: The Honorable John P. Hubbard, judge presiding.

STATE OF ALABAMA, *Montgomery County:*

Circuit Court of said County.

To the Hon. John P. Hubbard, judge presiding in said court:

The petition of the Western Union Telegraph Company respectfully shows to your honor that it is a corporation of the State of New York doing a general commercial telegraph business by authority of law in the State of Alabama, and was doing such business on and prior to the first day of January, 1885.

Second. Petitioner further shows that prior to said mentioned time it had filed its written acceptance with the Postmaster General of the terms, restrictions, and obligations, as provided by the act of Congress, approved July 24th, 1866, as the same is embodied in title 65 of the Revised Statutes of the United States upon the subject of telegraphs, and was at said time and is now in the full enjoyment and exercise of said franchises and privileges granted by the said act of Congress as aforesaid.

Third. Petitioner further shows to your honor that by an
3 act of the Legislature of Alabama entitled "An act to levy taxes for the use of the State and the counties thereof," approved Dec. 12th, 1884, it is provided that there shall be levied for the use of the State and to raise revenue therefor an annual tax upon the property, as mentioned in section 5 of said act, of sixty cents on the one hundred dollars of the value thereof; that the property enumerated under subdivision thirteen (13) of section 5 as subject to said tax is "all other property, real and personal, not otherwise specified herein."

Fourth. And petitioner further shows to your honor that by section 6 of said act, and in subdivision 6 thereof, it is provided that there shall also be assessed "on the gross amount of the receipts by any and every telegraph, telephone, electric light, and express company derived from business done by it in this State at the rate of two dollars on the one hundred dollars."

Fifth. And petitioner further shows to your honor that by section 15 of an act of the Legislature of Alabama entitled "An act to provide for the assessment and collection of taxes for the use of this State and the counties thereof, and to define the duties of officers
4 engaged about the said assessment and collection of taxes,"
approved Feb'ry 17th 1885, it is provided that the 'president, secretary, auditor, or managing agent in this State of every telegraph company whose line, or any part thereof, is within said State must annually, on or before the first day of April of each year, under oath, make return to the auditor of the State of the number of miles of telegraph wire in this State belonging to it and the value thereof, the number of poles, batteries, instruments, and articles of all kinds connected with its business and the value thereof, specifying the several counties, and must also in the said return report the gross receipts of the said company gained from its business in the said State during the year. Said board is hereby directed to proceed and deal with said returns and property as in case of railroads. Upon the valuation being made by the said board, the auditor must notify the result to the assessors of the several counties where the said property lies, as directed in the case of railroads, and the said assessors must thereafter deal with the matters in their several counties and with any other taxable property of said companies in their counties as they are directed to proceed in the case of railroads.'" And petitioner avers that by section 13 of said last-mentioned act it is
5 provided: "When the said board has assembled, as by this section
required, they shall proceed to examine and pass upon the returns by the previous section required" (of railroads), "and if no such returns have been received, then to consider and examine the values as assessed by the auditor, and decide upon the valuation to be charged for the purposes of taxation against said railroad companies on the property hereinbefore named. If at any meeting the board should not have in its possession satisfactory data upon which to base an estimate of the value of the property with the assessment of which it is charged, or from any other cause it is not able to make or complete its assessment, it shall have power to call upon any officer of any railroad for any records, books of any description, or for answers to any interrogatories which it may deem necessary to an intelligent discharge of its duties, and it shall also be empowered to require the attendance of any officer of any railroad, or any other person, when the testimony of such person may to it seem material in the case. The valuation of the property of railroad companies shall proceed upon the same as the valuation of every other species of property—that is to say, the valuation
6 of such property shall be had exclusively upon the consideration
of what a clear fee-simple title to such property would sell for under the conditions under which that character of property is most usually sold."

Sixth. And petitioner further shows to your honor that, in accordance with the said requirements of law, petitioner did on, to wit, the 18th day of March, 1885, through its district superintendent and managing agent in this State, under oath, make a true and accurate return to the auditor of the number of miles of telegraph wire in this State belonging to it and the value thereof, the number of poles, batteries, instruments, and articles of all kinds connected with its business and the value thereof in each of said counties in which said property is situated, and the value thereof in each of said counties; and it did also in its return of gross receipts correctly report and return the gross receipts of said company gained from the business done by it in this State during the year ending December 31st, 1884.

Seventh. And petitioner further shows unto your honor that the said board of assessment, composed of the Governor, the secretary of state, the auditor, and the treasurer of the State, together
7 with the attorney general of the State, met on, to wit, the 6th
day of May, 1885, and organized as a board of assessment of and equalization on railroad and telegraph property; that on May 22nd, 1885, at 4.30 p. m. of said date, a day and hour to which said board was regularly adjourned, the following proceedings were had by said board and entered in the records thereof, namely:

The board then proceeded to consider the reports made of telegraph companies, as to the value of their property, and, it being the opinion of the board that the value of the property of the Western Union Telegraph Company was too low, on motion of the auditor, M. C. Burke, the treasurer was ordered by the board to summon C. G. Merriwether, John T. Milner, and Edgar Winter to appear before the board at its next meeting, and, on motion, the board adjourned until Thursday, the 28th day of May, 1885.

Eight. And petitioner further shows to your honor that the said board having regularly met, pursuant to adjournment, on 28th day of May, 1885, the Western Union Telegraph Company appeared, by its attorney, and filed a written protest against any assessment of the gross receipts of such company, as appears by the records
8 of the proceedings of said board herewith filed as Exhibit
"A," page —; and petitioner further shows that at said meeting of said board the said C. G. Merriwether, district superintendent of the petitioner, appeared before the board and testified that the returns of the gross receipts of said company heretofore filed included and *was* made up only *for* the receipts for messages sent between places both of which were in the State of Alabama, and did not include receipts from messages from points within to points without the State or *vice versa*. Thereupon the board passed an order "that the said company be required to furnish the board with a statement of its receipts in full at its offices in this State on all messages sent or received in this State by June 20th, 1885; to which action of the board, in not accepting the said return of petitioner as to the gross receipts from its business done within the State of Alabama, and in requiring the company to make further return covering receipts on business done between points within the State of Alabama and points in other States and countries, this petitioner

objected and excepted, as appears by the transcript of the proceedings had by said board herewith filed as Exhibit "A," page 9.

9 Ninth. Petitioner further shows to your honor that the said C. G. Merriwether, superintendent, testified as to the cost and value of the poles and wires per mile at the time of the said return, and stated that the said return was his judgment as to the actual value of the respective lines indicated; and petitioner further shows that the said company was required at the next meeting to make further report as to their line on the Nashville and Decatur and Memphis and Charleston railroads and as to the Atlantic & Pacific telegraph line in Limestone county.

Tenth. And petitioner further shows to your honor that in accordance with the order and directions of said board, but under a formal protest in writing, the said defendant on the 27th day of June, 1885, filed a second return, covering its entire gross receipts at all offices in the State of Alabama for the year ending December 31st, 1884, which return included not only its gross receipts gained from its business done in this State, but also its receipts taken for business done partly within and partly without the State of Alabama during the said time; and petitioner — that on, to wit, the 29th day of June, 1885, at [a] regular term of said board [of] equalization or assessment, the said board by an order adopted as the amount of gross receipts subject to taxation in this State the said last
10 return so made under protest as aforesaid, and so embracing
receipts from business done partly within and partly without the State of Alabama, and assessed the same at the total value therein shown, to wit, the sum of $115,785.46, and apportioned the said assessment among the several counties, in the counties respectively; to which action of the board the said company, by its attorney, objected, and, its objection being overruled, it reserved an exception to the action of said board.

Eleventh. And petitioner further shows to your honor that at said last-mentioned meeting the said board of assessment wholly disregard*ing* the return by this petitioner, and wholly disregarded the testimony of the said Merriwether, and without any notice to this petitioner to show cause why the assessment should be raised to an amount over and above the values placed in the said return and the value testified to by the said Merriwether, and without further proof, the said property was assessed at a value different from that so returned and grossly in excess of its true value, as follows, to wit: The value of lines of poles was fixed at $40 per mile, and the length of line was fixed at 1,834.26 miles, and the gross valuation was assessed at $73,368.00, which said gross sum was apportioned
11 among the several counties of the State in proportion to the
length of lines of poles in said counties respectively, as shown by the return filed by this petitioner. And petitioner shows that the said valuations were fixed without regard to the testimony or other evidence properly before the said board, and without an opportunity to this defendant to be heard as to the said assessment; to which action of the board the defendant objected, and, the objection being overruled, it excepted.

Twelve. And petitioner further shows to your honor that, in disregard of the value so returned by it and of the testimony of the said Merriwether, which was the only testimony and evidence before the said board, the said board placed an excessive valuation over and above the true value upon the lines of wire, assessing the same at the sum of $20.00 per mile, or an aggregate valuation of $137,533.40 for the entire lines of wire in this State, and apportioned the same among the respective counties in proportion to the mileage in each county; to which action of the board said company objected, and, its objection being overruled, it excepted.

Thirteen. Petitioner here presents a full and complete transcript of all of the proceedings had, returns made, orders en-
12 tered, papers filed, and exceptions taken to the said action
of the said board pending the determination of the said matters, which transcript is herewith attached as Exhibit "A" and prayed to be taken as a part thereof.

Fourteen. Petitioner further shows to your honor that the action of said board in requiring petitioner to make a return of its gross receipts was for the sole and only purpose of assessing the same for taxation at the rate of $2 on the one hundred dollars thereof, and that said purpose is illegal, being in violation of section 1, article 16, of the constitution of Alabama, which provides that all taxes levied on property in this State shall be assessed in exact proportion to the value of such property; and of section 4, article 16, of the constitution of Alabama, which provides: "The General Assembly shall not have the power to levy in any one year a greater rate of taxation than three-fourths of one per cent. of the value of the taxable property within this State;" and of section 6, article 16, which provides: "That the property of private corporations, associations, and individuals of this State shall be forever taxed at the same rate."

Fifteen. Petitioner further shows to your honor that the action
of said board in requiring the said petitioner to make return
13 of and in assessing as well the gross receipts from inter-
state business as gross receipts derived by it from business done in the State is illegal and in violation of the said subdivision 6, section 6, of the said act, approved December 12th, 1884, and the said section 15 of the act approved February 17th, 1885, and is also in violation of subdivision 3 and subdivisions 7 of section 8, article 1, of the Constitution of the United States as well as in violation of the 14 amendment of said Constitution and of section- 1, 4, & 6 of article 11 of the constitution of Alabama.

Sixteen. And petitioner further shows to your honor that the action of said board, in so arbitrarily taxing the valuation on its lines of telegraph poles and telegraph wires, is in violation of section 7, article 1, of the constitution of Alabama and the 14th amendment of the Constitution of the United States. And petitioner further shows that the said board has exceeded its powers and jurisdiction, and has proceeded irregularly and in a manner not authorized by law, and has rendered an illegal judgment which will work a great damage to this petitioner unless the said orders, judgments, and acts shall be reviewed, set aside, and held for naught or so modified as to conform to law and the right of this petitioner.

Wherefore the petitioner prays for a writ of certiorari to be
14 issued out of and under the seal of this honorable court directly to Edward A. O'Neal, Governor, Thomas N. McClellan, attorney general, Ellis Phelan, secretary of state, M. C. Burke, auditor, and Fred. H. Smith, State treasurer, of the State of Alabama, directing them as a board of equalization and assessment to certify without delay *into* to this honorable court and to file therein a complete transcript of the record and proceedings had by it in reference to the said assessment of the property and gross receipts of the Western Union Telegraph Company, and a complete transcript of all papers and documents pertaining thereto which have been regularly filed with said board, and that your honor will, upon the filing of said transcript, set aside and hold for naught the said orders and assessments made by said board or render such other judgment as may be required by law in the several premises.

And the petitioner will ever pray.

C. G. MERRIWETHER,
*Dist. Supt.*

Subscribed and sworn to before me this 16th day of July, A. D. 1885.

Z. M. P. INGE,
*Notary Public, Mobile County, Alabama.*

GAYLORD B. CLARKE,
THOS. G. JONES,
*Atty's for Def'ts.*

15 EXHIBIT "A" to petition for certiorari.

Proceedings of the board of equalization on railroad and telegraph property, as provided by section 13 of the revenue law, approved February 17th, 1885, for the year 1885.

OFFICE OF THE STATE AUDITOR, MONTGOMERY, ALA.,
WEDNESDAY, *the 6th day of May*, 1885.

This being the first Wednesday in May, 1885, the day fixed by law for the meeting of the board of assessment for railroad and telegraph property, there met on said day, in the office of the auditor, Ellis Phelan, secretary of state; Fred. H. Smith, State treasurer; absent, E. A. O'Neal, Governor; M. C. Burke, auditor; Thomas N. McClellan, attorney general. A quorum not being present the board adjourned to meet at such a time and place as may be fixed by the Governor when notified of the failure of a quorum to meet this day, as provided by section 13 of the act to levy taxes for the use of the State and counties thereof.

ELLIS PHELAN, *Sect. of State.*
FRED. H. SMITH, *State Treasurer.*

A quorum of the board of assessment having failed to meet on the first Wednesday in May, 1885, in the office of the State auditor,
as provided by law, M. C. Burke, State auditor, addressed the
16 following communication to the Governor:

MONTGOMERY, ALA., *May 7th*, 1885.

To his Excellency E. A. O'Neal, Governor.

SIR: It becomes my duty to notify your excellency that a majority of the board of equalization on railroad and telegraph property in this State failed to meet at the office of the auditor on the first Wednesday in May, 1885, as required by law (section 13, page 26, Revenue Code). This notification is therefore made that your excellency may appoint another day of meeting of said board as early as practicable.

Most respectfully, M. C. BURKE,
*State Auditor.*

To which His Excellency E. A. O'Neal made the following reply:

"EXECUTIVE OFFICE, *May 7th*, 1885.

"Hon. M. C. Burke, auditor of Alabama.

"SIR: Acknowledging the receipt of your formal notice, that a majority of the board of equalization on railroad and telegraph were not present at the office of the auditor on the first Wednesday in May, 1885, as provided in section 13 of the act to provide for the
assessment and collection of taxes, &c., I, under and pursuant
17 to the requirements of said act, do appoint Wednesday, the
20th day of May, instant, as another day of meeting of the board, which appointment you will please notify to the other members of the board.

"Very respectfully, E. A. O'NEAL,
"*Governor.*"

Upon receipt of which the auditor addressed the following notice to the Honorable Fred. H. Smith, State treasurer; Ellis Phelan, secretary of state, and T. N. McClellan, attorney general, respectively, and also to Henry R. Shorter, president of the railroad commission, and to the officers of the several railroad companies in this State:

"MONTGOMERY, ALA., *May 8th*, 1885.

"SIR: A majority of the board of assessment on railroad and telegraph property having failed to meet at the office of the auditor on Wednesday, the 6th day of May, 1885, as provided in section 13 of an act "to provide for the assessment and collection of taxes, &c.," appproved February 17th, 1885, I, under and pursuant to the requirements of said act, notified the Governor of that fact; in answer to which his excellency the Governor has appointed Wednesday, the 20th day of May, instant, as another day of meeeting of the board, of which appointment you are hereby notified.

"Very respectfully, M. C. BURKE,
"*Auditor.*"

18 Montgomery, Ala., Wednesday, *May 20th*, 1885.

The board of assessment of railroad and telegraph property met in the office of the State auditor, pursuant to the appointment of His Excellency E. A. O'Neal, Governor.

Present: E. A. O'Neal, Governor, president of the board; Fred. H. Smith, State treasurer; Ellis Phelan, secretary of state; M. C. Burke, State auditor; T. N. McClellan, attorney general. The railroad commissioners, Henry R. Shorter, W. C. Tunstall, L. W. Lawler, were also present.

His Excellency E. A. O'Neal, president, called the meeting to order.

On motion of Fred. H. Smith, treasurer, Wm. S. Ford was elected secretary of the board.

The minutes were read, and, on motion of T. N. McClellan were ordered to be corrected by adding the words "and telegraph Co's" after the word railroad whereever it occurs.

On motion, the board adjourned until 3.30 p. m.

The board met, pursuant to adjournment, at 3.30 p. m., Wednesday, May 20th, 1885.

Present: E. A. O'Neal, Governor, president; Fred. H. Smith, State treasurer; Ellis Phelan, secretary of state; M. C. Burke, auditor; T.
N. McClellan, attorney general. The railroad commissioners,
19 Henry R. Shorter, W. C. Tunstall, L. W. Lawler, were also
present.

His Excellency E. A. O'Neal, president, called the meeting to order.

On motion of Ellis Phelan, secretary of state, the board proceeded to the consideration of the reports of the value of property made by the several railroad companies in this State.

On motion, the board adjourned until Thursday, the 21st day of May, 1885, at 12 m.

Montgomery, Ala., Thursday, *May 21st*, 1885.

The board met pursuant to adjournment at the office of the State auditor.

Present: His Excellency E. A. O'Neal, president; Fred H. Smith, State treasurer; Ellis Phelan, secretary of state; M. C. Burke, auditor; T. N. McClellan, attorney general.

His Excellency E. A. O'Neal, president, called the board to order.

The board continued to make assessments on railroad property.

On motion, the board adjourned until 10 a. m. on Friday, the 22nd day of May, 1885.

Montgomery, Ala., Friday, *May 22nd*, 1885.

The board met pursuant to adjournment in the office of the State auditor at 10 a. m.

Present: His Excellency E. A. O'Neal, president; F. H. Smith,
treasurer; M. C. Burke, auditor; Ellis Phelan, secretary of
20 state; T. N. McClellan, attorney general.

The president called the board to order.

The board continued to make assessments on railroad property.

On motion, the board adjourned until 4.30 p. m.

At 4.30 p. m. the board met pursuant to adjournment.

Present: His Excellency E. A. O'Neal, president; Fred. Smith, treasurer; M. C. Burke, auditor; Ellis Phelan, secretary of state; T. N. McClellan, attorney general.

The president called the board to order.

The board continued to make assessments on railroad property.

The board then proceeded to consider the reports made by telegraph companies as to the value of their property, and it being the opinion of the board that the value of the property of the Western Union Telegraph Company was too low—

On motion of the auditor, M. C. Burke, the secretary was ordered by the board to summon C. G. Merriwether, John T. Milner, and Edgar Winter to appear before the board at its next meeting; and, on motion, the board adjourned until Thursday next, the 28th day of May, 1885.

MONTGOMERY, ALA., THURSDAY, *May 28th*, 1885.

The board met pursuant to adjournment in the office of the State auditor.

21 Present: E. A. O'Neal, Governor, president; M. C. Burke, auditor; Fred. H. Smith, treasurer; T. N. McClellan, attorney general.

His Excellency E. A. O'Neal, president, called the board to order.

Mr. Edgar Winter appeared before the board in answer to summons sent him and asked the board to excuse his further attendance for the reason that the superintendent was present and for the further reason his personal attention was needed at his office.

On motion of the treasurer, he was excused from further attendance on the board.

In the matter of the assessment of the Western Union Telegraph Company's property, C. G. Merriwether, division superintendent of the company, appeared before the board at its request and testified that the returns of gross receipts of said company heretofore filed included and was made up only of the receipts for messages sent between places both of which were in the State of Alabama, and did not include receipts for messages from points within to points without the State, or *vice versa*.

On motion, it was ordered by the board that said company be required to furnish the board with a statement of its receipts in full at its offices in this State on all messages sent or received in this State by June 20th, 1885.

22 Mr. Merriwether further testified that telegraph poles cost from 70 cents to $1.05 each; that it required from 25 to 30 poles per mile of line; that cypress poles would last about eight years and cedar poles about fifteen years; that wire cost about $20.00 per mile, and deteriorated in value from 5 to 10 per cent. per annum, and that the cost of construction of a single line of telegraphy—that is, a line with one wire—was from 12 dollars to 20 dollars per mile.

On motion, it was ordered by the board that the company make at the next meeting of the board further report as to their lines on the Nashville and Decatur and the Memphis and Charleston railroads and as to the Atlantic and Pacific telegraph line in Limestone county.

Mr. Merriwether further stated to the board that the poles used by the Western Union Telegraph Company along the line of the Alabama Great Southern R. R. belong to the railroad company; also that the Alabama Great Southern R. R. Co. had two wires on said poles along the line of said railroad. It was his opinion also that the Memphis and Charleston Railroad Company owned a line of poles and wires. Mr. Merriwether further testified that in making the return of the value of lines of poles and wires the original cost of each line was considered, having regard to kind of poles and wire used, and from this a deduction was made for deterioration, depending upon the length of time the lines had been constructed and the length of time before it would be necessary to renew and reconstruct them, and that the return made was his judgment as to the actual value of the respective lines at the time indicated. 23

Gaylord B. Clark, Esq., attorney for the Western Union Telegraph Company, was present before the board and filed a protest as to the 2% tax on the gross receipts of the said Western Union Telegraph Company.

Mr. Clark also objected to the order requiring the company to make further return covering receipts on business done between points within the State of Alabama and points in other States and countries.

On motion, the board adjourned until 3.00 p. m. this 28th day of May, 1885.

Office of State Auditor,
*May 28th*, 1885—3 p. m.

The board met pursuant to adjournment.

Present: E. A. O'Neal, Governor; M. C. Burke, auditor; Fred. H. Smith, treasurer; T. N. McClellan, attorney general.

The board was called to order by Gov. E. A. O'Neal, president.

The board was occupied in considering assessments on railroad property.

24 On motion, the board adjourned until Saturday, the 20th day of June, 1885.

Office of State Auditor,
Saturday, *June 20th*, 1885.

There not being a quorum of the board present, no meeting for the transaction of business was held pursuant to adjournment to this day. The auditor notified the Governor of the failure to meet in the following form:

June 20th, 1885.

To His Excellency E. A. O'Neal, Governor.

Sir: There not being a quorum of the board of assessment of railroads & telegraph property present, pursuant to adjournment, no meeting for the transaction of business was held. This notification is therefore furnished that your excellency may appoint another day of meeting of said board as early as practicable.

Very respectfully, M. C. BURKE,
*Auditor.*

Which notice was delivered to the Governor on this day; and there being present the auditor, secretary of state, and attorney general, it was ordered, on motion, that for lack of a quorum the board stand adjourned until Wednesday, the 24th day of June, 1885.

OFFICE OF STATE AUDITOR,
WEDNESDAY, *June 24th*, 1885.

The auditor, secretary of state, and attorney general met pursuant to adjournment.

25 There not being a quorum of the board present, no meeting for the transaction of business was held.

On motion, it was ordered that the board stand adjourned until Monday, the 29th day of June, 1885.

On June the 25th, 1885, the auditor received the following communication from the Governor:

STATE OF ALABAMA, CHIEF EXECUTIVE OFFICE,
MONTGOMERY, ALA., *June 25th*, 1885.

Hon. M. C. Burke, State auditor, Montgomery, Ala.

DEAR SIR: Having been notified by you that a quorum of the board of assessment of railroad and telegraph property was not present at the meeting fixed by adjournment for the 20th inst., I, pursuant to law, appoint Monday next, the 29th instant, as another day for the meeting of the board, of which you will cause notice to be given to the other members.

Very respectfully, E. A. O'NEAL,
*Governor.*

Upon receipt of above notice of appointment of Monday, June 29th, 1885, as another day of meeting of the board was given by the auditor to Hon. F. H. Smith, Ellis Phelan, and T. N. McClellan, respectively, by the following letter:

STATE OF ALABAMA, REVENUE DEPARTMENT,
MONTGOMERY, ALA., *June 25th*, 1885.

26 SIR: I, under and pursuant to the requirements of the act "To provide for the assessment and collection of taxes," approved February 17th, 1885, notified the Governor that a quorum had failed to meet on the 20th of June, 1885, pursuant to adjournment; in answer to which his excellency the Governor has appointed Monday, June 29th, 1885, as another day of meeting of the board, of which appointment I hereby give you notice.

Very respectfully, M. C. BURKE,
*Auditor.*

OFFICE OF STATE AUDITOR,
MONTGOMERY, ALA., MONDAY, *June 29th*, 1885.

The board met pursuant to adjournment, and the order of the Governor appointing this day as another day of the meeting of the board —.

Present: M. C. Burke, auditor; Fred. H. Smith, treasurer; Ellis Phelan, secretary of state; T. N. McClellan, attorney general.

On motion, Ellis Phelan was elected president *pro tem.*

The board was called to order.

The assessment of the property and gross receipts of the Western Union Telegraph Company coming up for further consideration, said company filed under protest the amended statement of its gross receipts heretofore required by the board, said statement purporting to contain the gross receipts of said company of money re-
27 ceived at its offices in this State, whether from messages between points in the State or from points within to points without the State, and *vice versa.*

And said statement and return being considered by the board was, on motion, adopted by the board as the amount of gross receipts of said company subject to taxation in this State, and assess the same at the sum total therein shown for the State, to wit, the sum of $115,785 and $\frac{46}{100}$ dollars, and apportioned said assessment among the several counties in the sums shown thereby to have been received in the counties respectively. To this action of the board said company, by its attorney, objected, and its objection being overruled it reserved an exception to the action of the board.

And the matter of the assessment of the lines of poles and wires of said company in Alabama being next considered by the board, and the board having heretofore taken evidence, as hereinbefore noted, as to the value of such lines of poles and wires respectively, it was, on motion, ordered by the board that the value of such lines of poles for assessment be fixed at forty dollars per mile, and there being, according to the report of said company, 1,834 and $\frac{26}{100}$ miles in the State, that said gross valuation be assessed at $73,368.00, and that said gross sum be apportioned among the several coun-
28 ties of the State in proportion to the length of lines of poles in said counties respectively, as shown by said return, which in this respect is adopted by the board. To this action of the board said company also objected, and the objection being overruled excepted to action of [the] board, and it was further, on motion, ordered by the board that the value of said lines of wire be fixed and assessed for taxation at the sum of twenty dollars per mile; that the return of said company as to the length of such lines, which said return in this respect is accepted and adopted by the board, showing that of such lines of wire there are 6,876 and $\frac{67}{100}$ miles in this State and the several counties thereof, as shown by said return, — it is ordered that the aggregate value of said lines be assessed for taxation at $137,533 and $\frac{40}{100}$ dollars, and that said aggregate valuation be apportioned among the respective counties in proportion to the mileage of such lines in each county located. To this action of the board said company objected, and its objection being overruled it

excepted. It was further ordered, on motion, that the value of instruments of said company be assessed for taxation at the aggregate sum of six thousand three hundred and eighteen and $\frac{30}{100}$ dollars,
being the value at which they are returned by said company,
29 and that said aggregate sum be apportioned among the several counties in which said property is located, according to the value of the same in each county, as shown by said return, which in this respect is hereby adopted. On motion, the board adjourned until 4 o'clock this p. m.

Monday, *June 29th*, 1885—4 o'clock p. m.

The board met pursuant to adjournment.

Present: Ellis Phelan, secretary of state; M. C. Burke, auditor; Fred. H. Smith, treasurer; T. N. McClellan, attorney general.

The president *pro tem.* called the board to order.

On motion, the board adjourned until Friday, the 3rd day of July, 1885.

Office of State Auditor,
Montgomery, Ala., Friday, *July 3rd*, 1885.

The board met pursuant to adjournment.

Present: Ellis Phelan, secretary of state; M. C. Burke, auditor; Fred. H. Smith, treasurer; T. N. McClellan, attorney general.

Ellis Phelan, secretary of state, president *pro tem.*, called the board to order.

On motion, the board adjourned until 4 o'clock this p. m.

Office of State Auditor,
Montgomery, Ala., Friday, *July 3rd*, 1885.

The board met at 4 o'clock p. m. pursuant to adjournment.
30 Present: Ellis Phelan, secretary of state; M. C. Burke, auditor; Fred. H. Smith, treasurer; T. N. McClellan, attorney general.

The president *pro tem.* called the board to order, and, the minutes of the board for each meeting since its organization being read to and approved by the board, it is ordered, on motion, that the board adjourn without day.

E. A. O'NEAL, *Governor.*
ELLIS PHELAN,
*Secretary of State.*
FRED. H. SMITH, *Treasurer.*
M. C. BURKE, *Auditor.*
T. N. McCLELLAN,
*Attorney General.*

The State of Alabama, *Montgomery County:*

I, Wm. S. Ford, secretary of the board of assessment of railroad and telegraph property, hereby certify that the within and foregoing pages, from 1 to 16, inclusive, are a true copy and transcript of the minutes of the board of assessment of railroad and telegraph property so far as the same relates to the organization and meetings of said board and the action of the board so far as the Western Union Telegraph Co. is concerned.

Given under my hand this 9th day of July, 1885.

WM. S. FORD, *Secretary.*

THE STATE OF ALABAMA, *Montgomery County:*

I, M. C. Burke, auditor of the State of Alabama, do hereby certify
that the foregoing pages, from 1 to 16, inclusive, are a true
31 copy and transcript of the proceedings of the board of assess-
ment of railroad and telegraph property, as shown by the
books in this office, so far as the same relates to the organization of
said board and the action of said board so far as the Western Union
Telegraph Company is concerned.

Given under my hand, in the city of Montgomery, this 9th day of July, 1885.

[SEAL OF OFFICE.] M. C. BURKE, *Auditor.*

*Statement Returned by the Western Union Telegraph Company Showing the Value of the Property, &c., of the Western Union Telegraph Company in each County, City, and Incorporated Town in the State of Alabama for the Year* 1885.

| Names of counties & places. | Miles of poles. | Value. | Miles of wire. | Value. | Value of insts. & other property. | Total value. |
|---|---|---|---|---|---|---|
| Autauga county | 13 | 300 00 | 40 | 560 00 | 25 00 | 885 00 |
| Baldwin county | 62 | 800 00 | 350 | 2,400 00 | 40 00 | 3,240 00 |
| Barbour county | 28 | 210 00 | 54 | 470 00 | 60 00 | 740 00 |
| City of Eufaula | -------- | ---------- | 2 | 20 00 | 50 00 | 70 00 |
| Bibb county | 18 | 300 00 | 41 | 650 00 | 25 00 | 975 00 |
| Blount county | 19 | 350 00 | 76 | 800 00 | 40 00 | 1,190 00 |
| Bullock county | 51 | 200 00 | 120 | 1,130 00 | 40 00 | 1,370 00 |
| City of Union Springs | 1 | 10 00 | 4 | 40 00 | 50 00 | 100 00 |
| Butler county | 73 | 1,500 00 | 402 | 4,000 00 | 50 00 | 5,550 00 |
| City of Greenville | 1 | 20 00 | 5 | 50 00 | 50 00 | 120 00 |
| Calhoun county | 35 | 400 00 | 70 | 800 00 | 60 00 | 1,260 00 |
| City of Anniston | 50 | 10 00 | 2 | 20 00 | 30 00 | 60 00 |
| Chambers county | 34 | 400 00 | 170 | 1,300 00 | ---------- | 1,700 00 |
| 32 Cherokee county | 12 | 100 00 | 24 | 150 00 | 50 00 | 300 00 |
| Chilton county | 44 | 700 00 | 152 | 1,200 00 | 20 00 | 1,920 00 |
| Colbert county | 73 | 1,000 00 | 156 | 2,500 00 | 200 00 | 3,700 00 |
| Town of Tuscumbia | 50 | 10 00 | 3 | 25 00 | 75 00 | 110 00 |
| Town of Florence | 50 | 10 00 | 3 | 25 00 | 75 00 | 110 00 |
| Cullman county | 19 | 300 00 | 76 | 700 00 | 40 00 | 1,040 00 |
| Conecuh county | 44 | 1,500 00 | 242 | 2,500 00 | 30 00 | 4,030 00 |
| Dallas county | 117 | 2,250 00 | 261 | 2,800 00 | 70 00 | 5,120 00 |
| City of Selma | 1 | 50 00 | 5 | 80 00 | 250 00 | 380 00 |
| De Kalb county | -------- | ---------- | 42 | 450 00 | ---------- | 450 00 |
| Elmore county | 25.50 | 250 00 | 89 | 700 00 | 65 00 | 1,015 00 |
| Etowah county | -------- | ---------- | 19 | 200 00 | ---------- | 200 00 |
| Escambia county | 96 | 1,500 00 | 393 | 1,500 00 | 100 00 | 3,100 00 |
| Greene county | -------- | ---------- | 24 | 250 00 | ---------- | 250 00 |
| Town of Eutaw | .50 | 10 00 | 1 | 20 00 | 20 00 | 50 00 |

*Statement Returned by the Western Union Telegraph Company, &c.*—Continued.

| Names of counties & places. | Miles of poles. | Value. | Miles of wire. | Value. | Value of insts. & other property. | Total value. |
|---|---|---|---|---|---|---|
| Hale county | 14.50 | 100 00 | 40 | 400 00 | 20 00 | 520 00 |
| City of Greensboro | .50 | 10 00 | 1 | 10 00 | 50 00 | 70 00 |
| Jackson county | 106 | 1,500 00 | 154 | 2,200 00 | 500 00 | 4.200 00 |
| Jefferson county | 36 | 400 00 | 187 | 1,800 00 | 65 00 | 2,265 00 |
| City of Birmingham | 1 | 10 00 | 2 | 20 00 | 100 00 | 130 00 |
| Lawrence county | 50 | 500 00 | 100 | 1,200 00 | 83 30 | 1,783 30 |
| Lee county | 104 | 1,400 00 | 441 | 5,000 00 | 75 00 | 6,475 00 |
| City of Opelika | 2 | 30 00 | 6 | 60 00 | 125 00 | 215 00 |
| Limestone county | 50 | 500 00 | 166 | 2,800 00 | 50 00 | 3,350 00 |
| Lowndes county | 76 | 1,500 00 | 385 | 3,500 00 | 80 00 | 5,080 00 |
| Macon county | 62 | 875 00 | 349 | 3,500 00 | 75 00 | 4,450 00 |
| Madison county | 68 | 400 00 | 67 | 800 00 | 150 00 | 1,350 00 |
| City of Huntsville | 1 | 20 00 | 2 | 25 00 | 90 00 | 135 00 |
| Marengo county | 18.50 | 200 00 | 56 | 600 00 | 75 00 | 875 00 |
| City of Demopolis | .50 | 10 00 | 1 | 10 00 | 50 00 | 70 00 |
| Mobile county | 118.25 | 2,500 00 | 630.50 | 3,600 00 | 75 00 | 6,175 00 |
| 33 City of Mobile | 3 | 250 00 | 10 | 250 00 | 800 00 | 1,300 00 |
| Montgomery Co. | 105 | 2,400 00 | 551 | 4,300 00 | 90 00 | 6,790 00 |
| City of Montgomery | 3 | 150 00 | 12 | 300 00 | 1,500 00 | 1,950 00 |
| Morgan county | 41 | 400 00 | 184 | 700 00 | 200 00 | 1,300 00 |
| Town of Decatur | 1 | 15 00 | 2 | 20 00 | 100 00 | 135 00 |
| Perry county | 25 | 100 00 | 25 | 150 00 | 30 00 | 200 00 |
| City of Marion | 1 | 10 00 | 1 | 10 00 | 50 00 | 70 00 |
| Russell county | 36 | 300 00 | 72 | 500 00 | 50 00 | 850 00 |
| Shelby county | 63 | 600 00 | 186 | 1,000 00 | 40 00 | 1,640 00 |
| St. Clair county | ------- | ---------- | 29 | 300 00 | --------- | 300 00 |
| Sumter county | 40 | 250 00 | 123 | 1,150 00 | 50 00 | 1,450 00 |
| Talladega county | 39 | 500 00 | 79 | 1,200 00 | 50 00 | 1,750 00 |
| City of Talladega | 1 | 10 00 | 1 | 10 00 | 40 00 | 60 00 |
| Tuscaloosa county | -------- | ---------- | 38 | 380 00 | --------- | 380 00 |
| City of Tuscaloosa | 1.50 | 20 00 | 3 | 45 00 | 50 00 | 115 00 |
| Washington county | 36 | 200 00 | 108 | 700 00 | 40 00 | 940 00 |
| Wilcox county | 12 | 150 00 | 12 | 150 00 | 50 00 | 350 00 |
| Total | 1,884.25 | 27,490 00 | 6,849.50 | 62,030 00 | 6,318 30 | 95,838 30 |

NORVIN GREEN, *Pres't.*
A. R. BREWER, *Secretary.*

STATE OF NEW YORK,
*City and County of New York,* } *ss:*

I, William Arnoux, a notary public in and for the city, county, and State of New York, do hereby certify that on this 9th day of March, 1885, before me personally came Norwin Green, president, and A. R. Brewer, secretary, of the Western Union Telegraph Company, and severally made oath that the foregoing statement subscribed by them is true to the best of their knowledge, information, and belief.

[SEAL.] WM. ARNOUX,
34 *Notary Public, New York & Kings Co's.*

*Value of Western Union Telegraph Company's Property in Limestone and Madison Counties, Alabama, for the Year* 1884.

| Counties. | Miles of poles. | Value. | Miles of wire. | Value. | Value of instruments & other property. | Total. |
|---|---|---|---|---|---|---|
| L. & N. R. R. | 26.04 | 260 40 | 156.24 | 2,343 60 | 50 00 | 3,314 55 |
| Limestone, M. & C. R R. | 12.01 | 120 10 | 36.03 | 540 45 | | |
| | 38.05 | ---- | 192.27 | | | |
| Madison | 29.90 | 299 00 | 67.90 | 746 90 | 150 00 | 1,195 90 |
| City of Huntsville | 1 | 20 00 | 2 | 25 00 | 90 00 | 135 00 |

Supplemental and amended return covering the property owned by the Western Union Telegraph Company in the counties named, which is correct, to the best of [my] knowledge, information, and belief.

C. G. MERRIWETHER,
*Dist. Sup't.*

Subscribed & sworn to before me this 27th day of June, A. D. 1885.

H. C. DAVIDSON,
*Notary Public.*

WESTERN UNION TELEGRAPH COMPANY,
SUPERINTENDENT'S OFFICE,
MOBILE, ALA., *May 30th*, 1885.

James Compton, sup't.

DEAR SIR: I was before the State board of assessment at Montgomery a day or two ago in regard to the return of property and receipts made by the company to the State auditor, as required by the new law. The attorney general of the State is by the law
35 one of the board. In going over the property return list the
attorney general, who lives at Athens, Ala., stated that he did not think the return made for Limestone county was correct, and that there must be a mistake in it. The return for Limestone county shows as follows: Miles of poles, 50; miles of wire, 166. McClellan said he thought we had a line of poles on the R. R. through that county with four or five wires on them, besides the A. & P. lines through the woods, and asked me to explain it. I told him I would

investigate it. He also called attention to the Madison county. The return says 68 miles of poles and 67 miles of wire. He thought this must be a mistake, and I think it probably is. Will you kindly investigate the matter and let me know how many miles of poles and how many miles of wire we had in each of these counties January 1st, 1885, and oblige—

Yours truly, C. G. MERRIWETHER, *Sup't.*

*Tax Return for Limestone & Madison Counties, Ala. Resp'y Returned to C. G. Merriwether, Sup't.*

With detailed statement of our lines and wires in said county, you can say to the att'y general that the R. R. Co. ownes one set of poles & one wire on the M. & C. R. R.*

The enclosed statement embraces the full mileage of our poles & wires in those counties.

June 5, 1885.

J. COMPTON, *Sup't.*

*This line is not included in this statement, as it is not our property.

36 *In Re the Assessment of the Gross Receipts of the Western Union Telegraph Company Pending before the State Board of Assessment.*

Now comes the Western Union Telegraph Company and protests against the assessment of its gross receipts, upon the ground that the only purpose thereof is for the purpose of subjecting the same to a tax of two per cent., which said tax is void and the assessment therefor is void, because the said tax is unequal and grossly discriminating in its character as compared with the tax levied on the gross receipts of other persons and corporations.

2nd. Because the same is not equal and uniform with the taxes laid upon other property belonging to individuals & corporations.

3rd. Because the tax on property in general is levied at the rate of sixty cents on the one hundred dollars of value, whereas the tax on said gross receipts is levied at the rate of two dollars on the one hundred dollars of value.

4th. Because the gross and net receipts of persons and corporations in general is exempt from any tax whatever.

5th. Because said tax exceeds three-fourths of one per cent., and for said and other good and sufficient reasons the said Western Union Telegraph Company makes its return of the gross re-
37 ceipts derived from business done by it in this State under protest.

GAYLORD B. CLARK,
*Att'y for W. U. Tel. Co.*

MOBILE, ALA., *May 7th*, 1885.

To the auditor of the State of Alabama.

DEAR SIR: In accordance with the law, I hereby make the following return of gross receipts of the Western Union Telegraph

Company derived from business within the State of Alabama for the year ending December 31st, 1884.

Yours truly, C. G. MERRIWETHER,
*Dist. Supt.*

Subscribed and sworn to before me this 7th day of May, 1885.

JOHN H. TINDALL,
*Notary Public, Mobile Co., Ala.*

| Name of county. | Name of office. | Office receipts. | Total receipt from county. |
|---|---|---|---|
| Baldwin | Bay Minette | 56 22 | |
| | Tensas | 7 44 | 63 66 |
| Barbour | Eufaula | 811 08 | 811 08 |
| Bibb | Briarfield | 119 16 | |
| | Randolph | 52 38 | |
| | Woodstock | 109 68 | 281 22 |
| Blount | Bangor | 14 82 | |
| | Blount Springs | 194 76 | |
| | Hanceville | 58 68 | 268 26 |
| 38 Bullock | Mathews | 67 74 | |
| | Fitzpatrick | 122 88 | |
| | Midway | 111 42 | |
| | Union Springs | 723 78 | 1,025 82 |
| Butler | Bolling | 44 04 | |
| | Garland | 12 00 | |
| | Georgiana | 117 42 | |
| | Greenville | 708 00 | 881 46 |
| Calhoun | Anniston | 551 52 | |
| | Cross Plains | 35 58 | |
| | Jacksonville | 98 88 | |
| | Oxanna | 81 96 | |
| | Oxford | 184 26 | 952.20 |
| Cherokee | E. & W. Junction | 23 58 | |
| | Rock Run | 21 42 | |
| | Tecumseh | 36 66 | 81 66 |
| Chilton | Clanton | 161 22 | |
| | Jemison | 34 32 | |
| | Verbena | 208 62 | 404 16 |

| Name of county. | Name of office. | Office receipts. | Total receipt from county. |
|---|---|---|---|
| Colbert | Cherokee | 33 78 | |
| | Leighton | 85 02 | |
| | Tuscumbia | 273 84 | 392 64 |
| Conecuh | Castlebury | 102 36 | |
| | Evergreen | 198 78 | |
| | Repton | 46 80 | 347 94 |
| Cullman | Cullman | 173 22 | 173 22 |
| Dallas | Brown's | 39 48 | |
| | Marion Junction | 48 24 | |
| 39 | Minter's | 38 10 | |
| | Plantersville | 38 82 | |
| | Selma | 2,541 84 | 2,706 48 |
| De Kalb | Collinsville | 23 64 | |
| | Ft. Payne | 74 10 | |
| | Valley Heard | 24 54 | 122 28 |
| Elmore | Deatsville | 42 54 | |
| | Elmore | 32 46 | |
| | Tallassee | 285 84 | |
| | Wetumpka | 412 14 | 772 98 |
| Escambia | Brewton | 124 62 | |
| | Pollard | 50 82 | |
| | Wallace | 39 18 | |
| | Whiting | 121 38 | |
| | Williams | 63 30 | 399 30 |
| Etowah | Attalla | 39 36 | |
| | Gadsden | 296 82 | 336 18 |
| Green | Boligee | 22 32 | |
| | Eutaw | 278 94 | 301 26 |
| Hale | Akron | 57 30 | |
| | Greensboro | 427 38 | |
| | Gallion | 67 80 | |
| | Newberne | 75 06 | 627 54 |
| Jackson | Bridgeport | 11 04 | |
| 40 | Lime Rock | 50 82 | |
| | Larkinsville | 52 32 | |
| | Paint Rock | 30 12 | |

| Name of county. | Name of office. | Office receipts. | Total receipt from county. |
|---|---|---|---|
| Jackson | Scottsboro | 128 46 | |
| | Stevenson | 51 72 | 324 48 |
| Jefferson | Birmingham | 1,619 82 | |
| | Jonesboro | 7 74 | |
| | Newcastle | 123 48 | |
| | Oxmoor | 53 52 | |
| | Trussville | 4 80 | |
| | Warrior | 114 18 | 1,923 54 |
| Lauderdale | Florence | 125 58 | 125 58 |
| Lawrence | Courtland | 104 70 | |
| | Hillsboro | 89 88 | |
| | Town Creek | 41 82 | 236 40 |
| Lee | Auburn | 325 08 | |
| | Lochapoka | 28 14 | |
| | Opelika | 483 50 | |
| | Salem | 39 36 | |
| | Yongesboro | 41 28 | 917 36 |
| Limestone | Athens | 169 26 | |
| | Mooresville | 40 74 | 210 00 |
| Lowndes | Benton | 108 84 | |
| | Calhoun | 51 18 | |
| | Ft. Deposit | 92 70 | |
| 41 | Letohatchie | 35 10 | |
| | Lowndesboro | 131 82 | 419 64 |
| Macon | Chehaw | 20 22 | |
| | Cowles | 33 60 | |
| | Notasulga | 382 62 | |
| | Shorters | 48 78 | |
| | Tuskegee | 425 82 | 911 04 |
| Madison | Brownsboro | 35 94 | |
| | Huntsville | 711 84 | |
| | Madison | 53 88 | 801 66 |
| Marengo | Demopolis | 472 02 | |
| | Faunsdale | 141 36 | 613 38 |
| Mobile | Beaver Meadow | 7 86 | |
| | Chunchula | 30 72 | |

| Name of county. | Name of office. | Office receipts. | Total receipt from county. |
|---|---|---|---|
| | Citronelle | 59 34 | |
| | Grand Bay | 11 10 | |
| | Mobile | 2,046 72 | |
| | St. Elmo | 26 58 | |
| | Whistler | 21 24 | |
| | | | 2,203 56 |
| Montgomery | Montgomery | 4,664 28 | |
| | Pike Road | 191 46 | |
| | | | 4,855 74 |
| Morgan | Decatur | 446 82 | |
| | Falkville | 20 82 | |
| | Hartselle | 50 10 | |
| | | | 517 74 |
| Perry | Hamburg | 50 76 | |
| 42 | Marion | 405 00 | |
| | Scotts | 14 82 | |
| | Uniontown | 346 50 | |
| | | | 817 08 |
| Russell | Hurtsboro | 25 98 | |
| | Seale | 61 68 | |
| | | | 87 66 |
| Shelby | Calera | 370 02 | |
| | Columbiana | 162 66 | |
| | Helena | 72 72 | |
| | Montevalla | 154 14 | |
| | Siluria | 18 06 | |
| | | | 777 60 |
| St. Clair | Springville | 52 92 | |
| | Whitney | 16 62 | |
| | | | 69 54 |
| Sumter | Coatopa | 21 78 | |
| | Epes | 29 88 | |
| | Livingston | 117 48 | |
| | York | 59 70 | |
| | | | 228 84 |
| Talladega | Ala. Furnace | 21 54 | |
| | Alpine | 17 10 | |
| | Childersburg | 67 68 | |
| | Talladega | 546 60 | |
| | | | 652 92 |
| Tuscaloosa | Keener | 8 94 | |
| | Carthage | 3 00 | |
| | Coaling | 28 92 | |
| 43 | Tuscaloosa | 489 54 | |
| | | | 530 40 |
| Washington | Escatawpa | 6 00 | |
| | Lumberton | 16 92 | |
| | | | 22 92 |

| Name of county. | Name of office. | Office receipts. | Total receipt from county. |
|---|---|---|---|
| Wilcox | Pine Apple | 83 88 | |
| | Snow Hill | 186 48 | |
| | | | 270 36 |
| *Second Return of Gross Receipts. Filed June 27th,* 1885. | | | |
| Baldwin | Bay Minette | 101 62 | |
| | Tensaw | 25 45 | |
| | | 127 07 | 127 07 |
| Barbour | Eufaula | 6,012 39 | 6,012 39 |
| Bibb | Briarfield | 379 51 | |
| | Randolph | 121 30 | |
| | Vanus | 12 90 | |
| | Woodstock | 296 16 | |
| | | 809 87 | 809 87 |
| Blount | Bangor | 42 74 | |
| | Blount Springs | 455 83 | |
| | Hanceville | 78 13 | |
| | | 576 70 | 576 70 |
| Bullock | Mathews | 87 31 | |
| | Fitzpatrick | 77 12 | |
| | Midway | 169 28 | |
| | Union Springs | 2,250 68 | |
| | | 2,584 39 | 2,584 39 |
| Butler | Bolling | 112 62 | |
| | Garland | 18 41 | |
| | Georgiana | 120 52 | |
| | Greenville | 1,226 29 | |
| | | 1,477 84 | 1,477 84 |
| 44 Calhoun | Anniston | 2,270 28 | |
| | Cross Plains | 157 72 | |
| | Jacksonville | 260 06 | |
| | Oxanna | 81 96 | |
| | Oxford | 1,075 41 | |
| | | 3,845 43 | 3,845 43 |

### *Second Return of Gross Receipts, &c.*—Continued.

| Name of county. | Name of office. | Office receipts. | Total receipt from county. |
|---|---|---|---|
| Cherokee | E. & W. Junction | 46 87 | |
| | Rock Run | 222 16 | |
| | Tecumseh | 216 86 | |
| | | 485 89 | 485 89 |
| Chilton | Clanton | 181 95 | |
| | Jamison | 92 07 | |
| | Verbena | 383 80 | |
| | | 657 82 | 657 82 |
| Colbert | Cherokee | 122 63 | |
| | Leighton | 175 20 | |
| | Tuscumbia | 1,528 29 | |
| | | 1,826 32 | 1,826 32 |
| Conecuh | Castleberry | 70 48 | |
| | Evergreen | 329 69 | |
| | Repton | 91 02 | |
| | | 491 19 | 491 19 |
| Cullman | Cullman | 319 52 | 319 52 |
| De Kalb | Collinsville | 137 37 | |
| | Fort Payne | 97 80 | |
| | Valley Head | 32 68 | |
| | | 267 85 | 267 85 |
| Dallas | Brown | 44 15 | |
| | Marion Junction | 49 21 | |
| | Minter | 49 72 | |
| 45 | Pine Apple Junc. | 2 63 | |
| | Plantersville | 56 46 | |
| | Selma | 3,339 06 | |
| | | 9,541 23 | 9,541 23 |
| Elmore | Deetsville | 63 93 | |
| | Elmore | 48 08 | |

*Second Return of Gross Receipts, &c.*—Continued.

| Name of county. | Name of office. | Office receipts. | Total receipt from county. |
|---|---|---|---|
| | Tallassee | 313 38 | |
| | Wetumpka | 396 84 | |
| | | 822 23 | 822 23 |
| Escambia | Brewton | 202 50 | |
| | Pollard | 90 36 | |
| | Wallace | 39 18 | |
| | Whiting | 323 28 | |
| | Williams | 135 60 | |
| | | 790 92 | 790 92 |
| Etowah | Atalla | 208 40 | |
| | Gadsden | 1,354 18 | |
| | | 1,562 58 | 1,562 58 |
| Greene | Boligee | 72 66 | |
| | Miller's | 5 82 | |
| | Eutaw | 798 04 | |
| | | 876 52 | 876 52 |
| Hale | Acron | 74 65 | |
| | Gallion | 106 66 | |
| | Greensboro | 803 65 | |
| | Newbern | 72 34 | |
| | | 1,057 30 | 1,057 30 |
| Jackson | Bridgeport | 93 70 | |
| | Larkinsville | 57 75 | |
| | Lime Rock | 153 48 | |
| | Paint Rock | 111 71 | |
| 46 | Scottsboro | 373 63 | |
| | Stevenson | 243 65 | |
| | | 1,033 92 | 1,033 92 |
| Jefferson | Birmingham | 10,778 96 | |
| | Irondale | 10 46 | |
| | Jonesboro | 20 81 | |
| | New Castle | 197 94 | |
| | Oxmoor | 195 87 | |

## *Second Return of Gross Receipts, &c.*—Continued.

| Name of county. | Name of office. | Office receipts. | Total receipt from county. |
|---|---|---|---|
| | Trussville | 14 60 | |
| | Warrior | 249 89 | |
| | | 11,468 53 | 11,468 53 |
| Lauderdale | Florence | 822 40 | 822 40 |
| Lawrence | Courtland | 232 22 | |
| | Hillsboro | 152 56 | |
| | Town Creek | 107 16 | |
| | | 491 94 | 491 94 |
| Lee | Auburn | 375 93 | |
| | Loachapoka | 36 27 | |
| | Opelika | 3,025 15 | |
| | Salem | 85 12 | |
| | Yongesboro | 125 15 | |
| | | 3,647 62 | 3,647 62 |
| Limestone | Athens | 581 48 | |
| | Mooresville | 95 81 | |
| | | 677 29 | 677 29 |
| Lowndes | Benton | 127 14 | |
| | Calhoun | 53 36 | |
| | Ft. Deposit | 118 06 | |
| | Letohatchee | 63 29 | |
| | Lowndesboro | 114 05 | |
| | | 475 90 | 475 90 |
| 47 Macon | Chehaw | 39 40 | |
| | Cowles | 33 71 | |
| | Notasulga | 260 00 | |
| | Shorter's | 68 42 | |
| | Tuskegee | 602 23 | |
| | | 1,003 76 | 1,003 76 |

*Second Return of Gross Receipts, &c.*—Continued.

| Name of county. | Name of office. | Office receipts. | Total receipt from county. |
|---|---|---|---|
| Madison | Brownsboro | 60 27 | |
| | Huntsville | 5,618 26 | |
| | Madison | 92 21 | |
| | | 5,770 74 | 5,770 74 |
| Marengo | Demopolis | 985 32 | |
| | Faunsdale | 289 20 | |
| | | 1,274 52 | 1,274 52 |
| Mobile | Beaver Meadow | 37 10 | |
| | Chunchula | 54 96 | |
| | Citronelle | 116 52 | |
| | Grand Bay | 48 59 | |
| | Mobile | 25,423 19 | |
| | St. Elmo | 43 48 | |
| | Whistler | 65 78 | |
| | | 25,789 62 | 25,789 62 |
| Montgomery | Montgomery | 19,175 29 | |
| | Pike Road | 97 07 | |
| | | 19,272 36 | 19,272 36 |
| Morgan | Decatur | 1,234 74 | |
| | Falkville | 32 63 | |
| | Hartsell's | 130 17 | |
| | | 1,397 54 | 1,397 54 |
| Perry | Hamburg | 55 16 | |
| | Marion | 788 62 | |
| | Scott's | 15 17 | |
| | Uniontown | 878 14 | |
| | | 1,737 09 | 1,737 09 |
| Russell | Hurtsboro | 83 42 | |
| | Seale | 128 24 | |
| | | 211 66 | 211 66 |

48

*Second Return of Gross Receipts, &c.*—Continued.

| Name of county. | Name of office. | Office receipts. | Total receipt from county. |
|---|---|---|---|
| Shelby | Calera | 759 63 | |
| | Columbia | 414 37 | |
| | Helena | 86 90 | |
| | Montevallo | 171 89 | |
| | Siluria | 53 13 | |
| | | 1,484 92 | 1,484 92 |
| St. Clair | Springville | 115 63 | |
| | Whitney | 36 80 | |
| | | 152 43 | 152 43 |
| Sumter | Coatopa | 23 22 | |
| | Epes | 122 65 | |
| | Livingston | 504 16 | |
| | York | 94 83 | |
| | | 744 86 | 744 86 |
| Talladega | Ala. Furnace | 99 10 | |
| | Alpine | 38 27 | |
| | Childersburg | 97 39 | |
| | Talladega | 1,429 24 | |
| | | 1,664 00 | 1,664 00 |
| Tuscaloosa | Carthage | 11 74 | |
| | Coaling | 30 25 | |
| | Cottondale | 95 | |
| | Keener | 4 02 | |
| | Tuscaloosa | 2,078 00 | |
| | | 2,124 96 | 2,124 96 |
| Washington | Escatawpa | 14 00 | |
| | Lumberton | 34 34 | |
| | | 48 34 | 48 34 |
| Wilcox | Pine Apple | 142 29 | |
| | Snow Hill | 215 71 | |
| | | 358 00 | 358 00 |

The above figures include the entire gross receipts of the Western Union Telegraph Company for the year ending Dec. 31st, 1884, received in the State of Alabama, and include also the returns previously filed for the same period of business conducted wholly within the State.

NORVIN GREEN.
A. R. BREWER.

STATE OF NEW YORK,
*City & County of New York,* } *ss:*

I, William Arnoux, notary public, hereby certify that on the 23rd day of June, 1885, before me personally came Norvin Green, president, and A. R. Brewer, secretary, of the Western Union Telegraph Company, and severally made oath that the foregoing statement subscribed by them is true and correct to the best of their knowledge and belief.

In witness whereof I have hereunto set my hand and fixed my official seal this 23rd day of June, A. D. 1885.

[SEAL.] WM. ARNOUX,
*Notary Public, New York & Kings Co's.*

MONTGOMERY ALA., *June 27th*, 1885.

50 Now comes the Western Union Telegraph Company and files this its return for the entire gross receipts taken in at its offices in the State of Alabama for services performed by it. This return is made pursuant to the orders of the State board of equalization, and is made under protest, said company not hereby admitting that it is legally bound to make this return or that it is in any way liable to be taxed on such gross receipts, and particularly that part derived from business not done wholly within the State of Alabama, and which is determined by subtracting the amounts stated in the former return from the amounts herein returned.

WESTERN UNION TELEGRAPH COMPANY,
By GAYLORD B. CLARK, *Att'y.*

THE STATE OF ALABAMA, *Montgomery County:*

I, M. C. Burke, auditor of the State of Alabama, do hereby certify that the within and foregoing pages, from 1 to 24, inclusive, are a full, perfect, & complete exemplification, copy, and transcript of the returns of the property and gross earnings of the Western Union Telegraph Co. in the State of Alabama as the same appear of record in my office for the year ending Dec. 31st, 1884.

Given under my hand and seal of office, in the city of Montgomery, on this the 14th day of July, 1885.

[SEAL.] M. C. BURKE, *Auditor.*

51 STATE OF ALABAMA, *Montgomery County:*

I, M. C. Burke, auditor of the State of Alabama, do hereby certify that the within and foregoing pages, numbered from 1 to 40, both inclusive, are a full, complete, and perfect exemplification, copy, and transcript of the record and proceedings of the State board of assessment of railroad and telegraph property, including returns made, papers filed, orders entered, exceptions taken, and all other documents pertaining to the organization and action of said board concerning the returns by and assessment of property and gross earnings of the Western Union Telegraph Company in the State of Alabama for the year 1885, as the same appears of record in my office.

Given under my hand and seal of office this twenty-fourth day of July, 1885.

[SEAL.] M. C. BURKE, *Auditor.*

To E. R. Holt, clerk of the circuit court of Montgomery county:

Let certiorari issue upon the within application as prayed for.

JOHN P. HUBBARD,
*Judge 2nd Circuit.*

Filed in office Aug. 12th, 1885.

E. R. HOLT, *Clerk.*

*Writ of Certiorari.*

STATE OF ALABAMA, *Montgomery County:*

52 To E. A. O'Neal, Governor; Thomas N. McClellan, attorney general; Ellis Phelan, secretary of state; M. C. Burke, auditor, and Fred. Smith, treasurer, of the State of Alabama, composed the board of equalization and assessment for railroad and telegraph property:

We, being willing for certain causes to be certified of the proceedings had before you as the board of equalization and assessment for railroad and telegraph property in reference to the assessment of the property and gross receipts of the Western Union Telegraph Company for the year 1885, do therefore command you to send up to our next circuit court to be holden for Montgomery county, on the second Monday in December next, under your hand and seal, a complete transcript of the record and proceedings had by you in reference to the said assessment of the property and gross receipts of the Western Union Telegraph Company for the year 1885 and a complete transcript of all papers and documents pertaining thereto which have been regularly filed with said board of equalization and assessment for railroad and telegraph property, with all things touching the same as they remain in your office, that we may further cause to be done thereupon what of right, according to the laws of the State, ought to be done.

And you will proceed no further in the said matter of the assessment of the property and gross receipts of said Western Union
53 Telegraph Company for the year 1885, excepting to recall or suspend any notice which may have been given by you to the several county assessors in execution of your order made in the said premises.

Witness E. R. Holt, clerk of our said court, at office this 13th day of August, A. D. one thousand eight hundred and eighty-five.

E. R. HOLT, *Clerk.*

To the sheriff of Montgomery county to execute.

Executed this writ by leaving a copy of the same with each of the following-named parties, viz: E. A. O'Neal, Gov. of Ala.; Thos. N. McClellan, att'y gen'l; Ellis Phelan, sec'y of state; M. C. Burke, auditor; Fred. H. Smith, treasurer, composing the board of equalization & assessment of railroad & telegraph property, this 28th day of August, 1885.

T. S. HERBERT, *Sh'ff,*
By T. C. RAOUL, *D. S.*

### *Security for Costs.*

In the Circuit Court of Montgomery County. Dec'r Term, 1885.

THE WESTERN UNION TELEGRAPH COMPANY
*vs.*
E. A. O'NEAL, Gov., *et als.*, Composing Board of Equalization.

The plaintiff being a corporation, we hereby acknowledge ourselves security for costs in this case.

WILLIAM C. RAY.
M. P. LE GRAND.

Filed in office August 14th, 1885.

E. R. HOLT, *Clerk.*

### 54 *Motion of Respondents to Quash and Dismiss Certiorari.*

WESTERN UNION TEL. CO.
*vs.*
E. A. O'NEAL, Governor, M. C. BURKE, Auditor, *et als.*

In this matter it is admitted that M. C. Burke, State auditor, in compliance with statutory requirements, notified the tax assessors of the several counties in this State, in which the Western Union Tel. Co. is taxable, of the assessment of its property and subjects of taxation and the amounts thereof before the 9th day of July, 1885, and on that day said auditor notified the superintendent of said company of the valuations so certified to said assessors, and that all of these valuations in said counties, respectively, were duly enrolled on the books of assessment thereof, and said books were delivered to the several probate judges, and by said judges submitted to the several commissioners' courts before the issuance of the writs in this case, and said books have been by said courts passed upon and corrected, and as corrected certified to the several tax collectors of said counties, in some instances before writs issued and also in more instances before service of writ, and said books are now in the hands of said collectors as authorized by the statutes. This admission is made only for the purposes of this motion & subject to legal exception. It is further admitted, subject to all legal objection, that as a

matter of fact the petition was submitted to Hon. J. P. Hub-
55 bard before, and the first was made on July 25th, 1885, and
was not earlier filed on account of being misplaced in the express office & not sooner delivered.

*In re* THE WESTERN UNION TELEGRAPH CO.
*vs.*
EDWARD A. O'NEAL, Governor; M. C. BURKE, Auditor; FRED. H. Smith, Treasurer; —— ——, Secretary of State; Thos. N. McClellan, Attorney General.

Pending in the circuit court of Montgomery county on petition for certiorari to review and revise the action of the State board of assessment of certain property and subjects for taxation.

Now come the respondents above named and set out and, appearing only for the purpose of this motion, respectfully move the court to quash and dismiss the writ of certiorari heretofore issued in this case: For this, that said writ was improvidently issued; and for this, that the said petition and exhibits thereto fail to show a state of facts to justify or warrant the issuance of said writ; and for this, that the said writ and the exhibits thereto show that the action of said respondents, collectively, as the State board of assessment, &c., which is sought to be annulled and held for naught, was had in strict conformity with law; and

For this, that said board had jurisdiction of the subject-
56 matter involved in said action, with full power and authority
of law to proceed as it did proceed and to reach the conclusion complained of in said petition, and that said proceedings of said board to the end now sought to be defeated were in all things regular, all of which appears from said petition and exhibits thereto; and

For this, that the statutory provisions recited in said petition show that said board was authorized to assess the property and gross receipts of the petitioner for taxation for the year 1885; that in pursuance of such power and authority said board was regularly organized and regularly proceeded to the performance of the duties imposed by said statutes, and discharged the same by making and completing an assessment of the property and gross receipts of said petitioner in the manner provided for by law, and, having fully performed all the functions delegated to and vested in it, adjourned without day and ceased to have a legal existence before the filing of said petition and before the issuance and service of said writ; and

For this, that it is shown by said petition and exhibits thereto that said assessment was in all respects completed before the filing of said petition, and the assessment-roll, of which the assessment against this petitioner was a part, had been delivered to the tax
assessors of the several counties of this State in which peti-
57 tioner's property and subjects of taxation were located or
were received, and that all control of said board over the same had ceased and been forever lost; and

For this, that before said petition was filed said board had completed its assessment against the petitioner, adjourned without day, and ceased to have any existence; that said assessment had already been certified to the several tax assessors of the State for which the assessment had been made; that the same had by such tax assessors been put upon the books of assessment of their counties, respectively, and delivered as other assessments to the probate judges of said counties, respectively, and by said probate judges submitted to the several courts of county commissioners and by said courts regularly passed upon, opportunity allowed for the correction of the same, and thereafter duly [and] regularly certified to the several tax collectors of said counties, respectively, and said assessments are now in the hands of said collectors in the shape of warrants for collection, and are regularly charged up against said several collectors, and have thus passed beyond the control of said board or the officers of which said board is composed when *in esse*, all of which appears from said petition and exhibits thereto and from the presumption of law that public officers have discharged the duties 58 imposed on them; and

For this, that before the issuance and service of said writ and before the filing of said petition therefor said board of assessment had completed the assessment against the petitioner, as well as discharged all other duties developed upon it by law, and had finally adjourned without day and ceased to exist, and that said assessments passed out of its control, and its authority with reference to the same was forever lost, and that thereafter and also before the issuance and service of the writ and filing of the petition in this case the auditor of the State of Alabama, in the discharge of duty imposed on him as such officer by law, notified the several tax assessors of counties in which said petitioner was chargeable with taxes of the values set upon the property and subjects of taxation of the petitioner in their counties respectively, which said assessments against petitioner were also, before the commencement of this proceedings, duly entered upon the book of assessment in said several counties as property and subjects of taxation therein assessed were entered, and said book of assessment, also before the commencement of this proceeding, in each of said counties was delivered to the probate judge thereof, and that thereafter, and also before the commencement of this proceeding, said probate judge in each of 59 said counties delivered said book of assessment to the commissioners' court thereof, by which the same was accepted, and thereupon said court, after giving notice as required by law, held a meeting, as required by law, to examine the assessors' returns, as show- by said book, and to correct any error occurring therein; that all errors therein occurring were so corrected, and said book thereupon was certified by the presiding officer of said court to be correct, and such book so certified was then delivered to the tax collector of each county aforesaid, and is now held by him as his warrant for the collection of the taxes thereof; and

For this, that before the institution of this proceeding said assessment had been completed, and said board had adjourned, and said assessment had passed out of the control and custody of said board, and, having been regularly certified to, — the tax assessors delivered to the probate judges by such assessors, submitted by such judges to the several courts of county commissioners, corrected by said courts, and certified by the presiding officers thereof respectively to the several tax collectors, are now in the hands of such collectors as a warrant for the collection of the taxes so assessed; and

For this, that said petition and exhibits fail to show that any tax has been assessed against the petitioner; and

60 For this, that said petition and exhibits fail to show the rate at which the property and subjects of taxation of the petitioner has been assessed for taxation; and

For this, that said board did not fix a rate of taxation to be collected on the values assessed by it, and it does not appear whether the rate, if any, put upon said values by other officers was that prescribed by law or not; and for this, that the law imposing a tax on the gross receipts of petitioner and other telegraph companies embraces all the receipts of such companies at their offices in this State for messages sent and received by them at such offices between the same and all other points within or without the State; that the valuation put on petitioner's property was such as said board was authorized to put on the same, or, if not, that question cannot be litigated in this proceeding, and that the law imposing a two-per-cent. tax on the gross receipts of said companies is constitutional and valid, or, if not, that question cannot be adjudicated in this proceeding; wherefore these respondents move the court to quash, vacate, and dismiss said writ.

T. N. McCLELLAN,
*Att'y for Respondents.*

Filed in office this the 11th day of Febr'y, 1886.

E. R. HOLT, *Clerk.*

FEB'Y 13TH, 1886.

Court met pursuant to adjournment.

61 *Judgment Entry.*

THE WESTERN UNION TELEGRAPH COMPANY, Petitioner,
*vs.*
EDWARD A. O'NEAL, Governor, *et als.*, Respondents.

Came the parties by their attorneys, and the resignation of Ellis Phelan as sec't'y of state, one of the respondents of the petition herein, being suggested, it is ordered by the court that the proceedings be revived against Charles C. Langdon, his successor in the office of sec't'y of state, and the said Langdon comes into court and consenting thereto, without prejudice or waiving any legal objection available to the other respondents, it is ordered that this proceedings continue against the said Langdon in the stead of Ellis Phelan, sec't'y of state, &c.

And said respondents having made and filed their motion to quash, dismiss, and abate the writ of certiorari heretofore issued and now pending in this cause, and to dismiss the petition therefor

and the cause being argued and submitted to the court on the petition and exhibits thereto, and said motion and an agreed statement of facts thereto attached and being considered and examined by the court, it is ordered and adjudged that said motion to quash and dismiss be granted and allowed, and that said writ of certiorari heretofore issued and now pending in this cause against the respondents as members of the State board of assessment
62 be, and the same is hereby, quashed, abated, and dismissed; that said petition be denied and dismissed and said respondents go hence without day. It is further adjudged that the petitioner, the said Western Union Telegraph Company, and sureties on petitioner's bond for cost pay the cost of this proceedings, for which let execution issue.

*Petition for Appeal and Supercedeas.*

In the Circuit Court of Montgomery County.

THE WESTERN UNION TELEGRAPH COMPANY
*vs.*
EDWARD A. O'NEAL & Others, State Board of Assessors. } No. 867.

Your petitioner, The Western Union Telegraph Company, respectfully shows that it has prayed an appeal from the judgment rendered in the matter of the petition for a certiorari filed by your petitioner on the 12th day of August, 1885, against Edward A. O'Neal, Governor, and others, constituting the State board of assessors, whereby it was adjudged, among other things, as follows, to wit: "That said writ of certiorari heretofore issued and now pending in this cause against respondents as members of the State board of assessors be, and the same is hereby, quashed, abated, and dismissed; that said petition be denied and dismissed, and that said respondents go hence without day. It is further adjudged that the petition of said Western Union Telegraph Company and sureties on petitioner's bond for costs pay the costs of this proceeding, for which let execution issue."

63 Petitioner further shows that it desires to have said appeal operate as a supercedeas of the said judgment so rendered as aforesaid and a reinstatement of the said writ of certiorari in its full force and effect. Petitioner further prays that your honor will also make an order directing that said appeal operate as a supercedeas of the collection of the tax of two per cent. levied on $115,785.46, the sum assessed as gross receipts of said petitioner; and petitioner prays that your honor will fix the penalty and condition of the bond to be given by petitioner to make said appeal operate as a supercedeas, as herein prayed.

GAYLORD B. CLARK,
THOS. G. JONES,
*Att'ys for W. U. Tel. Co.*

Filed March 19th, 1886.

E. R. HOLT, *Clerk.*

*Order of Judge for Supercedeas.*

In the Circuit Court of Montgomery County.

THE WESTERN UNION TELEGRAPH COMPANY
*vs.*
EDWARD A. O'NEAL & Others, State Board of Assessors. } No. 867.

The Western Union Telegraph Company having filed its petition setting forth that it had prayed an appeal to the supreme court of the State of Alabama, returnable on the first Tuesday in April of the present term, and having in said petition prayed the court that it make an order directing said appeal to operate as a supercedeas and to fix the penalty and condition of the bond to be given by
64 said plaintiff, in order to secure the effect of a supercedeas on said appeal, it is ordered that upon said Western Union Telegraph Company making and filing a good and sufficient bond in the sum of $5,000.00, payable to Edward A. O'Neal and the other respondents in said petition for certiorari, and their successors in office, with sureties to be approved by the clerk of the court, and conditioned that said Western Union Telegraph Company shall pay all damages and costs sustained by the suing out of said appeal & such judgment as may be rendered upon said appeal, that thus the said appeal shall operate as a supercedeas, as prayed for by said Western Union Telegraph Company, and the clerk of said court will enter this order upon the minutes of said court.

JOHN P. HUBBARD,
*Presiding Judge.*

Filed March 19th, 1886.

E. R. HOLT, *Clerk.*

*Supercedeas Bond.*

STATE OF ALABAMA, *Montgomery County:*

Know all men by these presents that we, The Western Union Telegraph Company and John C. Graham [and] W. L. Chambers *and* are held *are held* and firmly bound unto E. A. O'Neal, Governor; Thomas N. McClellan, attorney general; C. C. Langdon, secre-
65 tary of state; M. C. Burke, auditor, and Fred. H. Smith, treasurer, composing the board of equalization and assessment for railroad and telegraph property, and their successors in office, in the full and just sum of five thousand dollars, for payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, successors, and assigns, severally and firmly, by these presents.

Sealed with our seals and dated this 20th day of March, 1886.

The condition of the above obligation is such that whereas, at the December term, 1885, of the circuit court of the State of Alabama holden in and for the county of Montgomery, said court rendered a judgment that the writ of certiorari heretofore issued at the instance of the Western Union Telegraph Company against the said E. A. O'Neal, as Governor; Thomas N. McClellan, as attorney general; C.

C. Langdon, as secretary of state; M. C. Burke, as auditor, and Fred. H. Smith, as treasurer, composing the board of equalization and assessment for railroad and telegraph —, be, and the same is hereby, quashed, abated, and dismissed, and that said petition be denied and dismissed, and that said respondent go hence without day, and that the costs of the proceeding be taxed against said Western Union Telegraph Company and its sureties on its bond for cost, for
66 which execution was directed to issue; and

Whereas the said Western Union Telegraph Company have this day prayed an appeal from said judgment to the supreme court of the State of Alabama to reverse said judgment, returnable on the first Tuesday in April of the present term, and also that the court make an order directing said appeal to operate as a supercedeas of said judgment and a reinstatement of the said writ of certiorari in its full force and effect, and to fix the penalty and condition of the bond to be given by said Western Union Telegraph Company, in order to secure the effect of the supercedeas on said appeal as aforesaid; and

Whereas the Honorable John P. Hubbard, presiding judge of said court, thereupon made the following order:

It is ordered that upon said Western Union Telegraph Company making and filing a good and sufficient bond in the sum of five thousand dollars, payable to E. A. O'Neal and the other respondents in said petition for certiorari, and their successors in office, with sureties to be approved by the clerk of the court, and conditioned that said Western Union Telegraph Company shall pay all damages and costs sustained by the suing out of said appeal and such judgment as may be rendered upon said appeal, that there the said appeal shall operate as a supercedeas, as prayed for by said
67 Western Union Telegraph Company; and

Whereas said appeal to the supreme court and a supercedeas of the judgment and a reinstatement of the said writ of certiorari in its full force and effect has been allowed and granted upon the filing of this bond:

Now, therefore, if the said The Western Union Telegraph Company shall pay all damages and costs sustained by the suing out of such appeal and such judgment as may be rendered upon said appeal, then this obligation to be void; otherwise to remain in full force and effect.

THE WESTERN UNION
TELEGRAPH CO.,
By EDGAR WINTER, *Manager*. [L. S.]
JOHN C. GRAHAM. [L. S.]
W. L. CHAMBERS. [L. S.]

Witness to signatures:
EDGAR WINTER.

Approved this 20th day of March, 1886.

E. R. HOLT,
*Clerk Circuit Court of Montgomery.*

Filed March 19th, 1886.

E. R. HOLT, *Clerk*.

*Notice of Supercedeas & Appeal.*

THE STATE OF ALABAMA, *Montgomery County:*

To any sheriff of the State of Alabama, Greeting:

Take notice that a supercedeas bond has this day been filed in the office of the clerk of the circuit court of Montgomery county, as required and ordered by the court, and an appeal granted
68 the petitioner in the case of The Western Union Telegraph Company *vs.* E. A. O'Neal, Governor, &c., & others, composing the State board of assessment for railroad and telegraph property, to the supreme court of said State to reverse a judgment rendered in favor of the respondents in said case at the Dec'r term, 1885, of said court for the amount due the State for taxes by said telegraph company, as awarded by the said State board in the discharge of their duties, as by law required of them, and costs of suit, and it is ordered that all further proceedings be suspended until the decision of our supreme court is made known; and said appeal is taken to the 1st Tuesday in April of the present term of said supreme court.

Witness my hand this 20th day of March, 1886.

E. R. HOLT, *Clerk*.

Executed by serving a copy of within on T. N. McClellan, as attorney general of State, this 22nd March, 1886.

T. S. HERBERT, *Sheriff*.
W. S. STOKES, *D. S.*

*Bill of Exceptions.*

In the Circuit Court of Montgomery County.

THE WESTERN UNION TELEGRAPH COMPANY
*vs.*
EDWARD A. O'NEAL & Others, State Board of Assessors. } No. 867.

Be it remembered that on the — day of March, 1886, being
69 a regular day of the fall term of said court, the following proceedings were had:

The respondent filed a written motion, which is hereto attached as Exhibit "A" and prayed to be taken as a part and hereby made part of this bill of exceptions. The respondent then introduced an agreed statement of facts, which is hereto attached as Exhibit "B" and prayed to be taken as a part and hereby made part of this bill of exceptions; whereupon the petitioner, The Western Union Telegraph Company, objected to the allowance of said motion, but the court overruled the said objection and granted the said motion and entered judgment thereon, copy of which is hereto attached as Exhibit "C" and prayed to be taken as a part of this bill of exceptions; that to the granting of said motion the petitioner excepted and now excepts and prays the court to sign and seal this its bill of exceptions, which was accordingly done in term time this 18th day of March, 1886.

JOHN P. HUBBARD,
*Presiding Judge.*

We agree that this bill of exceptions is correct and may be signed at any time within sixty days from this date, March 16th, 1886.

GAYLORD B. CLARK,
THOS. G. JONES,
*Att'ys for W U. Tel. Co.*
T. N. McCLELLAN,
*Att'y for Resp'ts.*

70 EXHIBIT "A."

In the Circuit Court of Montgomery County.

*In re* THE WESTERN UNION TELEGRAPH CO.
*vs.*
EDWARD A. O'NEAL, Governor; M. C. BURKE, Auditor; FRED. H. Smith, Treasurer; —— ——, Secretary of State; Thos. N. McClellan, Attorney General.

In the matter of petition for certiorari to review and revise the action of the State board of assessment of certain property and subjects for taxation.

Now come the respondents above named and set out, and, appearing only for the purposes of this motion, respectfully move the court to quash and dismiss the writ of certiorari heretofore issued in this case—

For this, that said writ was improvidently issued, &

For this, that the said petition and exhibits thereto fail to show a state of facts to justify or warrant the issuance of said writ; and

For this, that the said writ and the exhibits thereto show that the action of said respondents collectively as the State board of assessment, &c., which is sought to be annulled and held for naught, was had in strict conformity with law; and

For this, that said board had jurisdiction of the subject-matter involved in said action, with full power and authority of law 71 to proceed as it did proceed, and to reach the conclusions complained of in said petition, and that said proceedings of said board to the end now sought to be defeated were in all things regular, all of which appears from said petition and exhibits thereto; and

For this, that the statutory provisions recited in said petition show that said board was authorized to assess the property and gross receipts of the petitioner for taxation for the year 1885; that in pursuance of such power and authority said board *was* regularly proceeded to the performance of the duties imposed by said statutes, and discharged the same by making and completing an assessment of the property and gross receipts of said petitioner in the manner provided for by law, and, having fully performed all the functions delegated to and vested in it, adjourned without day and ceased to have a legal existence before the filing of said petition and before the issuance and service of said writ; and

For this, that it is shown by said petition and exhibits thereto that said assessment was in all respects completed before the filing of said petition, and the assessment-roll of which the assessment against this petitioner was a part had been delivered to the tax assessors of the several counties of this State in which peti-
72 tioner's property and subjects of taxation were located or
were received, and that all control of said board over the same had ceased and been forever lost; and

For this, that before said petition was filed said board had completed its assessment against the petitioner, adjourned without day, and ceased to have any existence; that said assessment had already been certified to the several tax assessors of the State for which the assessment had been made; that the same had by such tax assessors been put upon the books of assessment of their counties respectively and delivered as other assessments to the probate judges of said counties respectively, and by said probate judge submitted to the several courts of county commissioners, and by said courts regularly passed upon, opportunity allowed for the correction of the same, and thereafter duly and regularly certified to the several tax collectors of said counties respectively, and said assessments are now in the hands of said collectors in the shape of warrants for collection and are regulary charged up against said several collectors, and thus have passed beyond the control of said board or of the officers of which said board is composed when *in esse*, all of which
73 appears from said petition and exhibits thereto and from the
presumption of law that public officers have discharged the duties imposed on them; and

For this, that before the issuance and service of said writ, and before the filing of said petition therefor, said board of assessment had completed the assessment against the petitioner as well as discharged all other duties devolved upon it by law, and had finally adjourned without day and ceased to exist, and that said assessment passed out of its control, and its authority with reference to the same was forever lost, and that thereafter, and also before the issuance and service of the writ and of the filing of the petition in this case, the auditor of the State of Alabama, in the discharge of duty imposed on him as such officer by law, notified the several tax assessors of counties in which said petitioner was chargeable with taxes of the values set upon the property and subjects of taxation of the petitioner in their counties respectively, which said assessments against petitioner were, also before the commencement of this proceeding, duly entered upon this book of assessment in said several counties as property and subjects of taxation therein
74 assessed were entered; and said book of assessment,
also before the commencement of this proceeding, in each of said counties, was delivered to the probate judge thereof, and that thereafter, and also before the commencement of

this proceeding, said probate judge in each of said counties delivered said book of assessment to the commissioners' court thereof, by which the same was accepted; and thereupon said court, after giving notice, as required by law, held a meeting, as required by law, to examine the assessors' returns, as shown by said book, and to correct any error occurring therein; that all errors therein occurring were so corrected, and said book thereupon was certified by the presiding officer of said court to be correct, and such book, so certified, was then delivered to the tax collector of each county aforesaid, and is now held by him as his warrant for the collection of the taxes thereof; and

For this, that before the institution of this proceeding said assessment had been completed and said board had adjourned, and said assessment had passed out of the control and custody of said board, and, having been regularly certified to the tax assessors, delivered to
the probate judges by such assessors, submitted by such judges
75 to the several courts of county commissioners, corrected by
said court and certified by the presiding officers thereof respectively to the several tax collectors, are now in the hands of such collectors as a warrant for the collection of the taxes so assessed; and

For this, that said petition and exhibits fail to show that any tax has been assessed against the petitioner; and

For this, that said petition and exhibits fail to show the rate at which the property and subjects of taxation of the petitioner has been assessed for taxation; and

For this, that said board did not fix a rate of taxation to be collected on the values assessed by it, and it does not appear whether the rate, if any, put upon said values by other officers was that prescribed by law or not; and

For this, that the law imposing a tax on gross receipts of petitioner and other telegraph companies embrace- all the receipts of such companies at their offices in this State for messages sent and received by them at such offices between the same and all other points within or without the State; that the valuation put on petitioner's property was such as said board was authorized to put on the same; or, if not, that question cannot be litigated in this proceeding, and that the law imposing a two-per-cent. tax on the
76 gross receipts of said companies is constitutional and valid;
or, if not, that question cannot be adjudicated in this proceeding. Wherefore these respondents move the court to quash, vacate, and dismiss said writ.

T. N. McCLELLAN,
*Att'y for Resp'd'ts.*

EXHIBIT B.

WESTERN UNION TELEGRAPH COMPANY
*vs.*
EDWARD A. O'NEAL, Governor; M. C. BURKE, Auditor, *et al.*

In this matter it is admitted that M. C. Burke, State auditor, in compliance with statutory requirements, notified the tax assessors of the several counties in this State in which the Western Union

Telegraph Co. is taxable of the assessment of its property and subjects of taxation and the amounts thereof before the 9th day of July, 1885, and that on that day said auditor notified the superintendent of said company of the valuations so certified to said assessors, and that all of these valuations in said counties respectively were duly enrolled on the books thereof, and said books were delivered to the several probate judges, and by said judges submitted to the several commissioners' courts before the issue of the writ in this case, and said books have been by said courts passed
77 upon and corrected, and as corrected certified to the several tax collectors of said counties in some instances before writs issued, and also in more instances before service of writ, and said books are now in the hands of said collectors, as authorized by law.

The admissions are made only for the purposes of this motion and subject to legal exceptions. It is further admitted, subject to all legal objections, that, as a matter of fact, the petition was submitted to Hon. J. P. Hubbard before and the fiat was made on July 25th, 1885, and was not earlier filed on account of being misplaced in the express office and not sooner delivered.

GAYLORD B. CLARK,
THOS. G. JONES,
*Att'ys for W. U. Tel. Co.*

Filed March 19th, 1886.

E. R. HOLT, *Clerk.*

STATE OF ALABAMA, *Montgomery County:*

I, E. R. Holt, clerk of the circuit court in and for said county and State, hereby certify that the foregoing pages, numbered from one to eighty-two, inclusive, contain a full, true, and correct transcript of all the papers and proceedings had in a certain
78 cause lately pending in this court wherein The Western Union Telegraph Company was petitioner and E. A. O'Neal, Governor of the State of Alabama, and others composing the State board of assessment for railroad and telegraph property were respondents, as fully and completely as the same appears of record and on file in this office, and that the said petitioner has applied for and obtained an appeal to the supreme court of Alabama, returnable to the 1st Tuesday in April of the present term thereof, to reverse the judgment rendered in favor of the respondents, and for a supersedeas of said judgment, and that bond for such appeal and supersedeas has been filed, as required by the presiding judge, with Jno. C. Graham and W. L. Chambers as sureties thereon, all of which I certify to said supreme court.

Witness my hand this 30th day of March, 1886.

E. R. HOLT, *Clerk.*

Filed April 12th, 1886.

SANFORD, *Clerk.*

79 *Assignment of Errors.*

Dec. Term, A. D. 1886. 3 Div.

WESTERN UNION TELEGRAPH CO.
*vs.* 1039.
THE STATE BOARD OF ASSESSORS.

Now, at this term, comes the appellant and says that manifest error hath intervened in the record and proceedings of the court below to its injury, and assigns for error—

1st. The judgment quashing the writ of certiorari and dismissing the writ of appellant.

2d. The court below erred in not vacating and annulling the assessment made upon the gross receipts of the Western Union Telegraph Company.

3rd. The court below erred in not quashing and vacating the assessment upon the property of the petitioner other than its gross receipts.

4th. The court below erred in not vacating any assessment upon the gross receipts of petitioner and the tax thereon at a greater rate than 60 cents on the hundred dollars.

5th. The court below erred in sustaining the motion made by the attorney general to dismiss the writ of certiorari issued in the cause.

80 6th. The court below erred in not quashing the assessment upon the gross receipts for that portion of the business not done wholly within the State of Alabama.

7th. The court below erred in assessing gross receipts from business done partly within and partly without the State.

8th. The court below erred in not quashing and vacating so much of the assessment upon gross receipts as apportioned the same entirely to the counties where the gross receipts were collected instead of apportioning the same according to the proportion of telegraph lines in the respective counties.

9th. The court below erred in not quashing the assessment on gross receipts, because the statute which purports to authorize the tax is unconstitutional and violative of the XIV amendment of the Constitution of the United States.

10th. The court below erred in holding that the statute authorizing the tax on gross receipts was not violative of the constitution of the State or of the United States.

11th. The court below erred as appears on its judgment entry.

81 12th. The court below erred in not sustaining the certiorari as to the assessment upon gross receipts.

The court below erred in dismissing the certiorari and taxing appellant with costs.

GAYLORD B. CLARK,
THOS. G. JONES,
*Att'ys for Appellant.*

There is no error in the record.

T. N. McCLELLAN,
*Attorney for Appellees.*

Supreme Court.

SATURDAY, *June 5th*, 1886.

The court met pursuant to adjournment.
Present: All the justices.

82 Montgomery Circuit Court, 3 Div.

THE WESTERN UNION TELEGRAPH CO.
*vs.* 1039.
THE STATE BOARD OF ASSESSMENT.

Come the parties, by attorneys, and argue and submit this cause for decision.

Supreme Court.

THURSDAY, *July 15th*, 1886.

The court met pursuant to adjournment.
Present: All the justices.

Montgomery Circuit Court, 3 Div.

THE WESTERN UNION TELEGRAPH CO.
*vs.* 1039.
THE STATE BOARD OF ASSESSMENT.

Come the parties, by attorneys, and the record and matters therein assigned for errors being argued and submitted and duly examined and understood by the court, it is considered that in the record and proceedings of said circuit court there is no error. It is therefore considered that the judgment of said court be in all things affirmed. It is also considered that the appellant and John C. Graham and William L. Chambers, sureties on the appeal bond, pay the costs of appeal in this court and in the circuit court.

*Appeal from Montgomery Circuit Court.*

Supreme Court of Alabama, 3 Division. Dec'r Term, 1885–'86.

THE WESTERN UNION TELEGRAPH COMPANY
83 *vs.* 1039.
THE STATE BOARD OF ASSESSMENT.

CLOPTON, *J.:*

Subdivision six of section six of the revenue law levies a tax of two per centum "on the gross amount of the receipts by any and every telegraph, telephone, electric light, and express company derived from business done by it in this State." Acts 1884–'85, p. 10. The constitutionality of the statute is the material point of contestation, which question we shall consider on account of its importance to both the State and the tax-payer, pretermitting any expression of opinion as to the appropriateness or regularity of the proceedings. Appellant contends the statute violates section one of article eleven of the constitution, which requires that "All taxes shall be assessed in exact proportion to the value of such property;" and also section four of the same article, which provides "The General Assembly shall not have the power to levy, in any one year, a greater rate of taxation than three-fourths of one per centum on the value of taxable property within this State."

84 Prior to the constitution of 1865 the only limitations on the power of taxation were that no one shall be obliged to pay any tithes, taxes, or other rate for the building or repairing of any place of worship, or for the maintenance of any minister or ministry; that no power to levy taxes shall be delegated to individuals or private corporations, and taxes shall not be levied for their benefit without the consent of the tax-payer. The ad valor*u*m rule was first introduced, and then only applicable to real property, in the constitution of 1865, by the mandate, "All lands liable to taxation in this State shall be taxed in proportion to their value." On personal property taxes could be imposed as the Legislature might consider most expedient. The rule was extended and its application enlarged in the constitution of 1868, by incorporating therein an article providing, "All taxes levied on property in this State shall be assessed in exact proportion to the value of such property," and also a prohibition that the general assembly shall not have power to authorize any municipal corporation "to levy a tax on real and personal property to a greater extent than two per centum of the assessed value of such property." The provision of the
85 constitution of 1868, first quoted, entered *in totidem verbis* into the present constitution, with a superadded prohibition as to the rate of taxation to be levied by the General Assembly, and the rate authorized by municipal corporations was reduced. There are other provisions relating to taxation in the two later constitutions which it is unnecessary to note, as they have no material bearing on the question under consideration.

Having been taught by experience that no legislative power is more liable to oppressive use than the taxing power, and having suffered evils by resting it too broadly on discretion, the people have shown, in the history of the successive constitutions, a progressive policy to restrain the power of the legislative department in this respect, and to remedy existing and guard against apprehended evils by imposing limitations consistent with the public needs and the public safety. The just expositor, in interpreting the constitutional mandates and inhibitions, will consult the changes that have been made from time to time, the causes which produced them, and the mischief intended to be remedied. The words used should be allowed such operation and force as will reasonably accomplish the
86 purposes proposed, but without extension beyond their legitimate meaning, and so as to avoid embarrassing and disabling proper governmental administration. Thus considered and interpreted, do the provisions of the constitution apply to every subject of taxation to which resort is usually, and maybe legitimately, made to raise money for public purposes and needs, or only to direct taxation on property as such by prohibiting an arbitrary, specific standard, and requiring assessment in proportion to its value? Was

it intended to limit the subjects of taxation, or only to prescribe the mode of assessing the taxes when levied on a particular subject?

Fortunately we are not without aid in interpreting these provisions. Substantially similar provisions were contained in the constitutions of some of the other States, which had received judicial construction prior to their incorporation in either of our constitutions. The constitutions of California, Texas, Virginia, Louisiana, Illinois, Ohio, and other States contain similar or equivalent provisions which had been construed not to prescribe a limit as to the subjects of taxation, but as intended to prohibit an arbitrary taxation of property, as to kind or quality, without regard to value.
87 People *vs.* Coleman, 4 Cal., 46; Eyre *vs.* Jacob, 14 Gratt., 422;
Sawyers *vs.* City of Alton, 3 Scam., 127; Aulanier *vs.* Governor, 1 Lex., 653; Baker *vs.* Cincinnati, 11 Ohio St., 534. In Aulanier *vs.* Governor, *supra*, it is said: "The word property, as used in the constitution, cannot, by any forced construction, be tortured into meaning an occupation, calling, or profession." In Glasgow *vs.* Rowse, 43 Mo., 479, Wagner, J., says: "That taxes should be uniform and levied in proportion to the value of the property to be taxed is so manifestly just that it commends itself to universal assent. But, notwithstanding the constitutional provision, there are some kinds of taxes that are not usually assessed according to the value of property, and some which could not be thus assessed; and there is, perhaps, not a State in this Union, though many of them have in substance the same constitutional provision, which does not levy other taxes than those imposed on property. * * * It therefore seems plain that the constitutional requirement that 'taxation upon property shall be in proportion to its value' does not include every species of taxation, nor, indeed, would it be possible to place such an interpretation upon it without doing the grossest injustice." In Buroughs on Taxation, § 54, referring to such limitations, the author observes: "These provisions, as a general rule, are held to
88 apply to property alone, and not to include taxation on
privileges or occupations, or upon the exercise of a civil right, as taking by devise or descent." Cooley's Con. Lim., 619; Western U. Tel. Co. *vs.* Mayer, 28 Ohio St., 521; State *vs.* Western U. Tel. Co., 63 Me., 518.

It is conceded that the word property is sometimes employed in the revenue laws in its comprehensive sense and as synonymous with subjects, and will be so construed when required by the context or when the manifest purpose of the law will be otherwise defeated. Such is the case of Lehman, Durr & Co. *vs.* Robinson, 59 Ala., 219. Being used in more than one sense, the inquiry is in what meaning is it employed in respect to the levying of taxes? If there be nothing showing a different intention, words ordinarily are to be taken in their usual and familiar import, and when general and continuous usage in legislation respecting a particular subject-matter has imparted a particular meaning subsequent use of the same word in legislation relating to the same subject-matter creates a reasonable inference that it was intended to be employed in the same sense, there being nothing in the context showing a different

intention. Taxes are not levied upon the right a man may have to anything—the right of possession, use, enjoyment, and
89 disposition, which is property, taken in its legal and technical signification—but upon the subject of these rights; therefore, in specifying the subjects generally, an obvious distinction is recognized and maintained between property taxed as such and the other subjects of taxation. In Lott *vs.* Ross, 38 Ala., 156, the question was whether the authority conferred on the county of Mobile to assess and collect a tax not exceeding twenty cents upon each hundred dollars of taxable property within the county conferred a power to levy a tax of twenty cents upon each hundred dollars of the gross amount of the sales of merchandise. The authority was claimed on the ground that the State revenue law assessed a tax on the gross amount of sales of merchandise, thereby constituting such sales taxable property. It was held that every subject of taxation under the State laws cannot be considered as embraced by the terms "taxable property" employed in the special act, and that in various sections of the general revenue law the distinction between property made liable to taxes and other subjects of taxation is clearly drawn. It is said "a tax upon the gross amount of sales of merchandise under section 391 of the Code is not a tax upon the goods themselves or the fruits of the sale, but upon the busi-
90 ness or act of selling. This is not, then, a property or income tax, but an occupation or privilege tax, the amount being regulated by the extent to which the privilege has been enjoyed." Property, when employed in connection with the assessment and levy of taxes, had thus received a judicial interpretation which we must presume was in the contemplation of the framers of the organic law.

Not only were the provisions of the constitution adopted in view of the judicial construction placed upon the meaning of "property" as used in the revenue laws several years previously, but the special matter of consideration was the necessity and expediency of restraining the power to tax as conferred by the general grant of legislative power. The convention was advised that, independent of special restrictions, the taxing power extends to "person or property or possession, franchise or privilege, or occupation or right," and reaches every source of revenue and subject of taxation within the jurisdiction of the State, only limited by public purposes, and only restrained by the protection guaranteed to private rights against oppression, and that all these sources and subjects of taxation had been and were resorted to. Property always had been, and
91 was, the main reliance for raising revenue. The apprehended evils and dangers of oppressive and arbitrary taxation were especially directed to this subject—property, tangible and visible, capable of being reached and easily confiscated. The desideratum was the protection of the property of the citizen against forced contributions or legislative plunder. Assessment in exact proportion to value is the mode and means of protection, with an added limitation on the rate of taxation. Hence the limitation in the constitution of 1865 is extended in the constitution of 1868 from lands to

property as embracing the subjects of ownership, whether real or personal, and the same clause is brought into the present constitution without any modification or change. With a knowledge of the various subjects of taxation, of the well-defined distinction between property when made liable to taxes and other subjects of taxation, and that among such other subjects were occupations, privileges, business, and licenses, which in the nature of things are incapable of determinate value, valuation was adopted as the basis and measure of assessment. The limitations, by their terms, signify an intention that the provisions shall be only applicable to property the value of which is capable of definite ascertainment by the
92 officer whose duty it is to make the assessment, and that all
other subjects of taxation should be excluded from their operation. The language is: "All taxes levied on property in this State shall be assessed in exact proportion to the value of such property." The terms are restricted to property as a species of the genus "subjects of taxation."

The context shows that the word is employed in its usual and ordinary meaning, designating the thing owned, in the same sense in which it was generally used in the sections of the revenue laws relating to the assessment and levy of taxes. The legal and logical sequence of the position of appellant would be that the limitations operate to prohibit the levy of taxes on any subject not susceptible of determinate value.

It is contended that if the word "property," as used in section one of article eleven, be construed as not synonymous with "subjects of taxation," the terms "taxable property," as used in section four of the same article, include any subject which can be taxed, and that the section forbids a greater rate of taxation on any subject than three-fourths of one per cent. If the terms of the section had been general, prohibiting a greater rate on any taxable property, without qualifying words, there would have been much force
93 in the argument of counsel. But here, also, we find valuation
constituting the basis on which the prohibition as to the rate rests, and by which it is determined.

In Lott *vs.* Rose, *supra*, these words were construed. It is said: "Where the words 'taxable property' occur in an independent act it would seem that they should be understood in the sense of things taxed which are susceptible of ownership or possession, unless there is something in the context which affixes to them a different meaning, or unless the plain object of the law will be defeated, if they are not held to cover subjects of taxation which are not property in the ordinary sense." If so construed, when employed in an independent act, *a fortiori*, such should be the construction when used in a section composing, with others, the article of the constitution relating to the subject of taxation, all the sections of which, being *in pari materia*, should be construed together. The framers of the present constitution, experiencing that the limitation in the one preceding requiring taxes levied on property to be assessed in proportion to value was ineffectual to prevent oppressive taxation, connected

therewith a prohibition as to the rate of taxation on such
94 valuation.

It may be considered that the gross receipts from business are property in its strict meaning. In such sense it was undoubtedly employed in the majority opinion in State Freight Tax, 15 Wall., 284, the authority of which is weakened by the dissenting opinion, in which it was said that the tax on gross receipts of railroad companies is a tax for the privilege of transportation. In Lott *vs.* Rose, *supra*, it was held that a tax on the gross amount of sales of merchandise, which are gross receipts, is not a property or income tax, but an occupation or privilege tax, the amount regulated by the extent of the business done. In Board of Revenue *vs.* Gas Light Co., 64 Ala., 269, and in State *vs.* Board of Revenue, 73 Ala., 65, the tax was imposed on the net income and not on the business. The money held and owned by the company as the net result of the business was the subject of taxation. An income tax stands on different principles. Its value is determinable, and the rules governing such tax are inapplicable to a tax on gross receipts. One of the recognized modes of taxing business is a tax on gross receipts, which generally are not regarded as property for taxing purposes. State *vs.*
P., W. & B. R. R. Co., 45 Md., 361; Phil. Con. Ins. *vs* Com-
95 monwealth, 98 Penn. St., 48; Sacramento *vs.* Crocker, 16 Cal.,
120; Warring *vs.* Savannah, 60 Ga., 99; Winby *vs.* Girardy, 31 La. Ann., 382. Taxable, as used in the fourth section, qualifies and designates property, not which it may be in the power of the Legislature to make liable, but which is made liable to taxation. The value of such property must be determined before it can be ascertained that the rate of taxation imposed exceeds the rate limited by the constitution. By what measure or *criteria* can the value of business be ascertained which so largely depends upon the vigilance, energy, and skill exercised in its prosecution? The gross receipts constitute no measure of value, for they may be large, and yet the business be valueless by reason of losses, misfortune, or mismanagement. Business, though made a subject of taxation, not being capable of determinate value, is not taxable property in the meaning of the terms employed in the constitutional limitation of the rate of taxation.

It is further insisted that the section of the revenue law under consideration is violative of the constitution in that the rule of equality and uniformity is disregarded by putting an arbitrary value on the gross receipts of telegraph companies and a different value on the gross receipts of other kinds of companies.

96 The proposition, as stated in the argument of counsel, is "When income or gross receipts are taxed, everybody that is taxed in this State must be taxed alike." The fallacy of the proposition consists in the assumption that the tax on gross receipts is levied by a standard of valuation instead of by the character and extent of the business. Whilst there is no provision of the constitution commanding in terms equality and uniformity, the principle should underlie and regulate the provisions of every law imposing public burdens and charges. It is not controverted that the taxing

power may select the subjects of taxation and constitutionally classify them. Taxes should be imposed on any subject in just proportion to the benefits and protection which such subject receives more than other subjects of taxation. The rule of uniformity does not require that all subjects be taxed, nor taxed alike. The requirement is complied with when the tax is levied equally and uniformly on all subjects of the same class and kind. It extends to the class upon which the tax shall operate. Different occupations may be taxed at different rates, and some may be altogether exempted, and the requirement of uniformity is not infringed if the various classifications include all occupations similarly circumstanced
97
and of the same kind. Moog *vs.* Randolph, 77 Ala., 597; State Railroad Tax Cases, 92 U. S., 575; Worth *vs.* Wil. & Wel. R. R. Co., 13 Am. & Eng. R. R. Cas., 286; County of San Mateo *vs.* So. Pac. R. R. Co., 8 Am. & Eng. R. R. Cas., 1; Cooley on Taxation, 170. The tax complained of may be onerous and apparently unequal with the tax levied on the business of other corporations or companies. This is a matter submitted to the discretion and judgment of the Legislature, and their conclusion must be regarded as conclusive. The courts cannot interfere unless an illegal or unauthorized exaction is attempted.

A construction which limits the tax to gross receipts derived from business done between points both of which are within the territorial limits of the State is more restrictive than the words and purpose of the statute import. The Legislature knew that the appellant company operated extensive telegraph lines from places beyond, into, and through the State, and intended to make the tax commensurate with the benefits and protection received from the Government. Receiving messages at offices located in the State for transmission, and transmitting them without, is business done in
98
this State, though the service may not be complete until the delivery to the sendee at some place beyond its boundaries.

The statute does not purport to tax gross receipts not collected in Alabama, but by fair interpretation includes all receipts derived from business done in this State and actually received here, though the message may have to be delivered at or may be sent for delivery from some office without the jurisdiction of the State. Though thus construed, the statute is not an unauthorized interference with interstate commerce.

This question is fully and ably considered and discussed in the following cases: Western U. Tel. Co. *vs.* Richmond, 26 Gratt., 1; Western U. Tel. Co. *vs.* State, 55 Tex., 314; Western U. Tel. Co. *vs.* Mayer, 28 Ohio St., *supra;* Port of Mobile *vs.* Leloup, 76 Ala., 401, and is expressly decided in respect to a tax on the gross receipts of railroad companies, though consisting in part of freights received for transportation of merchandise from the State to another State or into the State from another, in State Freight Tax Cases, 15 Wall., 284; Osborne *vs.* Mobile, 16 Wall., 479.

Further discussion would be superfluous.

Affirmed.

UNITED STATES OF AMERICA, *ss:*

99 The President of the United States to the honorable the supreme court of Alabama, consisting of George W. Stone, chief justice, and Henderson M. Somerville and David Clopton, justices:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Alabama, before you or some of you, being in the highest court of law or equity of the said State in which a decision could be had in the said suit between The Western Union Telegraph Company and E. A. O'Neal, as Governor; Charles C. Langdon, as secretary of state; Malcolm C. Burke, as auditor, and Fred. H. Smith, as treasurer, of the State of Alabama, composing the board for the assessment of the property of railroads and telegraph companies, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, and also wherein was drawn in question the construction of the 14th amendment to the Constitution of the United States and also of clause 3, section 8, of article 1 of the Constitution of the United States, and
100 the decision was against the right, title, privilege, or exemption set up or claimed under each of said clauses of the said Constitution, a manifest error had happened, to the great damage of the said The Western Union Telegraph Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 19th day of July, in the year of our Lord one thousand eight hundred and eighty-six.

101 [SEAL.] J. W. DIMMICK,
*Clerk of the Circuit Court of the United States for the Middle District of Alabama.*

Allowed by—
GEO. W. STONE,
*Chief Justice of the Supreme Court of Alabama.*
July 19th, 1886.

Filed in clerk's office this 19th day of July, A. D. 1886.
JOHN W. A. SANFORD,
*Clerk of Supreme Court of Alabama.*

Know all men by these presents that we, The Western Union Telegraph Company, a corporation under the laws of the State of New York, and William B. Jones and Warren D. Brown, are firmly held and bound unto E. A. O'Neal, as Governor; Charles C. Langdon, as secretary of state; Malcolm C. Burke, as auditor, and Fred. H. Smith, as treasurer, of the State of Alabama, composing the board for the assessment of the property of railroads and telegraph companies, and their successors in office, in the full and just sum of five thousand ($5,000.00) dollars, to be paid to the said E. A. O'Neal, as Governor; Charles C. Langdon, as secretary of state; Malcolm C.
102 Burke, as auditor, and Fred. H. Smith, as treasurer, of the State
of Alabama, composing the board for the assessment of the property of railroads and telegraph companies, and their successors in office; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 20th day of July, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at the December term, 1885, of the supreme court of Alabama, in a suit pending in said court between The Western Union Telegraph Company and E. A. O'Neal, as Governor; Charles C. Langdon, as secretary of state; Malcolm C. Burke, as auditor, and Fred. H. Smith, as treasurer, of the State of Alabama, composing the board for the assessment of the property of railroads and telegraph companies, judgment was rendered against the said Western Union Telegraph Company, and the said Western Union Telegraph Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said E. A. O'Neal, as Governor; Charles C. Langdon, as secretary of state; Malcolm C. Burke, as auditor, and Fred. H. Smith, as treasurer, of the
103 State of Alabama, composing the board for the assessment of
the property of railroads and telegraph companies, citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Western Union Telegraph Company shall prosecute its writ of error to effect, and answer all damages and costs if said Western Union Telegraph Company fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY, [L. S.]
By SAM'L E. WILSON,
*Its Attorney-in-Fact in the Premises.*
W. D. BROWN. [L. S.]
WM. B. JONES. [L. S.]

Witnessed and approved July 19th, 1886.

GEO. W. STONE,
*Chief Justice, Supreme Court of Alabama.*

Filed in clerk's office this 19th day of July, A. D. 1886.

JOHN W. A. SANFORD,
*Clerk of Supreme Court of Alabama.*

The United States of America, Greeting:

104 You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein The Western Union Telegraph Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Stone, chief justice of the supreme court of Alabama, this 19th day of July, in the year of our Lord one thousand eight hundred and eighty-six.

GEO. W. STONE,
*Chief Justice of the Supreme Court of Alabama.*

I hereby accept service of the within citation for E. A. O'Neal, as Governor; M. C. Burke, as auditor; F. H. Smith, as treasurer, and C. C. Langdon, as secretary of state, of Alabama, composing the State board of assessment, this July 20th, 1886.

T. N. McCLELLAN,
*Att'y General.*

105 THE STATE OF ALABAMA, *Montgomery County:*

I, John W. A. Sanford, clerk of the supreme court of the State of Alabama, do hereby certify that the foregoing pages, numbered from 1 to 101, inclusive, contain a full, true, complete, and perfect transcript of the record and proceedings of the said supreme court in the cause lately pending in the said court, wherein The Western Union Telegraph Company was appellant and The State Board of Assessment was appellee, and that the writ of error hereunto attached is the original writ issued, allowed, and filed in the office of the clerk of said supreme court, and that the citation hereto attached was issued and the return of execution of said citation filed in said office of the clerk of said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, at the capitol, in the city of Montgomery, in said State of Alabama, on the 28th day of August, A. D. eighteen hundred and eighty-six.

[Seal of the Supreme Court of Alabama.]

JOHN W. A. SANFORD,
*Clerk of the Supreme Court of the State of Alabama.*

106 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of Alabama, consisting of George W. Stone, chief justice, and Henderson M. Somerville and David Clopton, justices:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of Alabama, before you, or some of you, being in the highest court of law or equity of the said State in which a decision could be had in the said suit between The Western Union Telegraph Company and E. A. O'Neal, as Governor; Charles C. Langdon, as secretary of state; Malcolm C. Burke, as auditor, and Fred. H. Smith, as treasurer, of the State of Alabama, composing the board for the assessment of the property of railroads and telegraph companies, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, and also wherein was drawn in question the construction of the 14th amendment to the Constitution of the United States, and also of clause 3, section 8, of article 1 of the Constitution of the United States, and the decision was against the right, title, privilege, or exemption set up or claimed under each of said clauses of the said Constitution, a manifest error ha*d* happened, to the great damage of the said The Western Union Telegraph Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
Court of the United States, together with this writ, so that you
107 have the same at Washington on the second Monday of Octo-
ber next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 19th day of July, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
*Clerk of the Circuit Court of the United States*
*for the Middle District of Alabama.*

Allowed by—
GEO. W. STONE,
*Chief Justice of the Supreme Court of Alabama.*

July 19, 1886.

108 [Endorsed:] Western Union Tel. Co. *vs.* State Board of Assessors. Writ of error. Filed in clerk's office this 19th day of July, A. D. 1886. John W. A. Sanford, clerk of supreme [court] of Alabama.

109 The United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein The Western Union Telegraph Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Stone, chief justice of the supreme court of Alabama, this 19th day of July, in the year of our Lord one thousand eight hundred and eighty-six.

GEO. W. STONE,
*Chief Justice of the Supreme Court of Alabama.*

110 [Endorsed:] Original. W. U. Tel. Co. *v.* State Board Assessors. Citation. Filed in clerk's office this 19th day of July, A. D. 1886. John W. A. Sanford, clerk of supreme court of Alabama.

I hereby accept service of the within citation for E. A. O'Neal, as Governor; M. C. Burke, as auditor; F. H. Smith, as treasurer; and C. C. Langdon, as sec't'y of state, of Alabama, composing the State Board of Assessment, this July 20, 1886.

T. N. McCLELLAN,
*Att'y Gen'l.*

[Stamped:] Supreme Court U. S., clerk's office. Received Oct. 4, 1886.

Endorsed on cover: Alabama supreme court. No. 1066. The Western Union Telegraph Company, plaintiff in error, *vs.* E. A. O'Neal, Governor; C. C. Langdon, secretary of state; M. C. Burke, auditor, and Fred. H. Smith, treasurer, composing the State Board of Assessment. Filed October, 4, 1886.

Office Supreme Court U. S.
FILED.
NOV 11 1889
JAMES H. McKENNEY,
CLERK

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# Supreme Court of the United States.

## OCTOBER TERM, 1889.

## No. 115.

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,
*vs.*
E. A. O'NEAL, GOVERNOR, ET AL., EX-OFFICIO, COMPOSING THE STATE BOARD OF ASSESSMENT OF ALABAMA, DEFENDANTS.

*In Error to the Supreme Court of the State of Alabama.*

BRIEF OF GAYLORD B. CLARK AND THOS. G. JONES,
FOR PLAINTIFF IN ERROR.

# Supreme Court of the United States.

## OCTOBER TERM, 1889.

## No. 115.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,
*vs.*
E. A. O'NEAL, GOVERNOR, ET AL., EX-OFFICIO, COMPOSING THE STATE BOARD OF ASSESSMENT OF ALABAMA, Defendants.

*In Error to the Supreme Court of the State of Alabama.*

Brief of Gaylord B. Clark, for Plaintiff in Error.
and of Thos. G. Jones, Associate Counsel.

## STATEMENT OF THE CASE.

The writ of error in this case was sued out on a judgment of the Supreme Court of Alabama, affirming the legality of a State tax of two per cent. levied upon the gross amounts received by the Western Union Telegraph Company, through its agents in Alabama, for all business done by it, whether between points wholly within said State or between points in said State and points in the other states and territories of the Union.

The defendants in error are the Governor, the Secretary of State, the Auditor, the Treasurer and the Attorney-General of Alabama, ex-officio, composing and, when assembled and acting in the premises, constituting the State Board of Assessment for Railroad and Telegraph Property.

The plaintiff in error being required by the terms of the revised statutes of Alabama to make return to the State Auditor of its "gross receipts gained from its business in the State during the year," made under protest against the legality of any tax on gross receipts a return of all its receipts from business done wholly within the State of Alabama.—(Record, pp 3, 4 and 10.)

The defendants in error having met and organized as the State Board of Assessment for Railroad and Telegraph Property, declined to accept the said return as a correct return of the Telegraph Company's gross receipts, and against the objection of said Company made an order that by a certain day, then in the future, the said Company should furnish the said Board of Assessment with a statement of its receipts in full at its offices in this State on all messages sent or received in this State-—(Record pp. 9 and 10.)

The Telegraph Company complied with the foregoing order in terms, but under protest, showing all receipts of money taken in by it at all of its offices in the State of Alabama, including the receipts for inter-state business as well as for business done wholly within the State.—(Record, pp 22 to 28.)

On June 29th, 1885, the Board of Assessment passed an order adopting the said last mentioned return as furnishing the true and legal basis of assessment of the gross receipts of said company which was subject to the two per cent. tax. To this action the Company objected, but the objection was overruled and the said aggregate sum so assessed was directed to be apportioned among the several counties in the sums shown to have been received in the said counties respectively, to all of which the said Telegraph Company duly excepted.—(Record, p 12.)

On the 9th day of July the Auditor notified said Company, as required by law, of the official action of said Board.—(Record, p. 30.)

The statutes of Alabama under which said Board assumed to act are fully set forth in the appendix hereto, as A and B respectively.—(*Vide* particularly Appendix A, §6, paragraph 6, p. vii, and Appendix B, §§13, 14 and 15, pp. ix, x and xi).

As soon after such action of the Board as a transcript of its proceedings could be obtained and a petition therefor could be prepared an application was made to the Hon. John B. Hubbard, Circuit Judge, for a writ of *certiorari*, which was promptly granted, returnable into the Circuit Court of Montgomery county. But, owing to the misplacement of the package, the petition and fiat were not received by the clerk until the 12th of August.—(Record, pp. 30, 31.) As no question of practice is before this court the statute under which these proceedings were taken will not be referred to.

The petition for *certiorari* set forth the entire returns made to and proceedings of the State Board of Assessment in the premises, and alleged that the *sole purpose of the assessment of said gross receipts was that a tax of two per cent. might be levied thereon* and demanded of the said Company.—(*Vide* paragraph 4, Record, p. 1, and paragraph 14 of said petition.—(Record, p. 5.)

By the laws of Alabama the said assessment was in the nature of a judgment debt against the Telegraph Company, and was a lien on all of its property in the State of Alabama.—(Appendix B, §§135 and 136, p. xiv.)

No answer controverting any of the facts set up in the petition was filed by the defendants, but a motion was made to quash, vacate and dismiss the writ (Record, pp. 31, 33), which motion admitting the truth of the allegations of the petition was entertained and granted by the court, and the writ was accordingly quashed and the petition dismissed (Record, p. 33), and said Company took a bill of exceptions.—(Record, p. 37.)

From this order an appeal with supersedeas was taken to the Supreme Court of Alabama.—(Record, pp. 34 and 35.)

A number of errors were assigned and urged, raising for the consideration of this honorable court, among other things, the validity upon constitutional grounds of said gross receipt tax and of the action of said State Board of Assessment in assessing for such taxation the gross receipts received by said Telegraph Company in such manner as to include receipts from its inter-state business.—(Record, p. 42.)

The State Supreme Court affirmed the judgment of the lower court and rendered a judgment holding that said two per cent. tax upon the gross receipts of telegraph companies, and the action of the State Board of Assessment in reference to the assessment of the gross receipts of said Telegraph Company, was in all things constitutional, legal, regular and binding on defendants.—(Record, pp. 43-49.)

## ASSIGNMENT OF ERROR.

The Supreme Court of Alabama erred:—

1. In affirming the judgment of the Circuit Court quashing and abating the writ of *certiorari*.—(Record, pp. 33, 43 and 49.)

2. In affirming the judgment of the Circuit Court denying and dismissing out of court the petition for *certiorari*, and in ordering the defendants in error to go thence without delay.

3. In not reversing the decision and setting aside the judgment rendered by the Circuit Court, which quashed and abated

the writ of *certiorari*, and denied and dismissed the petition of the Telegraph Company.—(Record, pp 33, 43.)

4. In not holding and adjudging that the assessment for the purpose of levying a tax on the gross receipts of the Western Union Telegraph Company, a corporation of the State of New York, was void. The said gross receipts not having a situs for such taxation in the State of Alabama at the time of such assessment.

5. In not holding and adjudging to be void the assessment for taxation of the gross receipts of the said Telegraph Company, which included the receipts for telegrams passing between points within and points without the State of Alabama.

6. In not holding and adjudging to be void the assessment of that portion of the gross receipts of said Telegraph Company received for telegrams passing between points within and points without the State of Alabama.

7. In holding that the plaintiff in error was liable to be compelled to pay an occupation or privilege tax for the right to exercise its franchises, and to do the business of telegraphy for the public and government in the State of Alabama.

8. In holding that the gross receipts of the Western Union Telegraph Company could be assessed for taxation at a higher rate of taxation than was generally charged other corporations and individuals upon their gross receipts.—(Record, pp 43-49.)

## ARGUMENT.

By the laws of Alabama in force at the time the State Board of Assessment of Railroad and Telegraph Property, hereinafter for convenience, styled the "State Board," made the assessment of the gross receipt of the Western Union Telegraph Company; said Telegraph Company was required to list and pay taxes upon all of its real, personal and mixed property of every kind and character, and which had a situs in said State, including poles, wires, batteries, instruments, and office furniture, at the same rate and to the same extent as other persons and corporations were required so to do.—(*Vide* Appendix A, section 4, par. 13, p. 5, and Appendix B, §15, p. 11.)

The tax on gross receipts was in addition to the regular property tax such as was paid by persons and corporations in general.

Whether a gross receipt tax is, abstractly and properly considered, a *property* tax and ordinarily justified as such in the State where it may at the time have a situs (State Tax on Railway Gross Receipts, 15 Wall, 284) is, for the purpose of this case, immaterial as the opinion of the Supreme Court of Alabama in the case at bar has expressly construed the State statutes by which the tax is sought to be imposed, (Appendix A and B) in such manner as to make the two per cent. gross receipt tax in question an *occupation* or *privilege tax* pure and simple.—(Opinion of the court, Record, pp 43-49.)

In fact there was no other construction which could be given the said tax which would not have made it grossly obnoxious to Article XI, Sections 1, 4 and 6, of the Constitution of Alabama, (Appendix C, post) and while it may be difficult to appreciate and to follow the reasoning of the learned Supreme Court of Alabama in its endeavor to draw a distinction between gross receipts, quasi-gross or quasi-net and pure net receipts or income in their relation to the principles of taxation, and to harmonize the decision in this case with those in the cases of The Board of Revenue *vs.* The Gas Light Company, 64 Alabama, 269, and the State *vs.* The Board of Revenue, 73 Alabama, 65. Still the Construction put upon the statute by that court will for the purposes of this appeal be regarded as the proper construction and the judgment of the court thereon treated accordingly, notwithstanding this court might have put on such statutes a different construction, People *vs.* Weaver, 100 U. S., 539; Supervisors *vs.* Stanley, 105 U. S., 305, 310.

The judgment of the Supreme Court of Alabama was entered on the 15th day of July, 1886, (Record, p 43) and sometime before the decisions of this court in the cases of Fargo *vs.* Michigan, 121 U. S., 231; Philadelphia and Southern Steamship Company *vs.* Pennsylvania, 122 U. S., 326; The Telegraph Company *vs.* Massachusetts, 125 U. S., 530; Ratterman *vs.* Western Union Telegraph Company, 127 U. S., 411; Leloup *vs.* Port of Mobile, 127 U. S., 640; and was expressly based on its own opinion in The Port of Mobile *vs.* Leloup, 76 Ala., 401, and on the opinions of this court in the cases of Osborne *vs.* Mobile, 16 Wall, 479, and State Tax and Railway Gross Receipts, 15 Wall, 284. The first two of which cases are expressly over-ruled by this court in Leloup *vs.* The Port of Mobile, 127 U. S., 640, and the last one questioned, in Philadelphia Steamship Company *vs.* Pennsylvania, 122 U. S., 326, 342. It is more than probable that if these later decisions of this court had been previously made and promulgated, that the Alabama Supreme Court would have reached a different conclusion as to the validity of an occupation tax on a telegraph company, which is shown to have accepted the benefits of the acts of Congress, U. S. Revised Statutes, §§5,263 to 5,269—(Record, p. 1; also, Appendix D, post), and would have held as futile any attempt upon the part of the State to have taxed its inter-state business.

The decisions of this court in the several cases *supra*, reported in the 121, 122, 125 and 127 U. S. Reports, are conclusive of the question that any attempt to obstruct or tax inter-state commerce on the part of a State, whether by a specific tax, license, gross receipts-tax, or otherwise, are in violation of Article 1, §8, clause 3 of the constitution of the United States, which provides that Congress has power to "regulate commerce with foreign nations and among the several states," and of Article 6, paragraph 2, "The constitution of the United States and the laws made in pursuance thereof are the supreme law of the land."

I do not think it necessary to discuss this phase of the controversy, as it is no longer an open question.

### THE TAX VOID IN TOTO.

I contend that the assessment and tax are void, both as to the gross receipts derived from inter-state business, and as to that collected upon business done wholly within the limits of the State.

1. Because there is no provision under the statute, as construed by the State Supreme Court, making a separate assessment of the gross receipts on infra-state business as an occupation or privilege tax for the conduct of that particularly limited business—and no levy of a tax specially upon the said portion of gross receipts as distinct from the entire gross receipts, and there is no tribunal excepting the State Board to which the return was made, that can make the assessment or apportion the tax among the several counties —(Appendix B, § 14, p. xi.
2. The tax itself, as well as the assessment, violates Article 1, section 8, clause 7 of the Constitution of the United States which provides that Congress has power "to establish post-offices and post-roads."
3. There is no situs of the gross receipts within the State of Alabama for the purpose of taxation, and—
4. The tax of two per cent. was class legislation and an unjust discrimination against the corporations engaged in the telegraph business—and consequently a violation of the fourteenth amendment to the constitution of the United States.

*First, the tax is not susceptable of apportionment* under the construction given to the statute by the State Supreme Court, but is, under the statutes of Alabama, a single occupation or privilege tax for doing the business of public telegraphy in the State of Alabama without regard to the State or inter-state business. The said statutes do not provide in letter or in spirit for the assessment of two distinct occupation taxes, viz: a tax for doing business wholly within the State, fixed by the gross receipts of such business, and a separate tax for doing an inter-state business, determined by the amount of gross receipts thus derived, so as to enable this court to hold the one void and permit the other to stand. This court cannot amend the Alabama statute by construction, or give to it a different import from that declared by the State Supreme Court to be the true legislative intent. If it were a property tax it might be different, for this court might under certain circumstances, declare as matter of law that a certain portion of the property assessed was not subject to the tax, and that another part was so subject, and if proper machinery could be found for the separation of the assessment or collection of the tax it might so order. We conceive that it makes no difference that a basis is fixed by the statute for the ascertainment of the amount to be charged as the single occupation tax, which enables us to say that such a portion of the amount fixed was due to the existence of inter-state gross receipts and the balance to the existence of purely domestic business—it is at last a single occupation tax for the pursuit of a single occupation, and which is rendered invalid *in toto* by the fact that the occupation taxed *embraces* inter-state commerce.

"The constitutionality or unconstitutionality of a State "tax is determined not by the form or agency through which it "is to be collected, but by the *subject upon which* the burden is "laid."—Case of State Freight Tax, 15 Wall, 232, 272. The subject in the case at bar is the *occupation of telegraphy*, embracing the business o: inter-state telegraphy—case at bar, Record, pp. 48, 49, reported in 80 Ala. R., p. 273. Says the court (Alabama Record, p. 48): "In Lott vs. Rose, 38 Ala., 156, it "was held that a tax on the gross amount of sales of merchandise, "which are gross receipts, is not a property or income tax, but "an occupation or privilege tax, the amount regulated by the

"extent of the business done. * * * * * * *
"An income tax stands on different principles—its value is "determinable—and the rules governing such tax are inappli- "cable to a tax on gross receipts. One of the recognized "modes of taxing business is a tax on gross receipts, which "generally are not regarded as property for taxing purposes. "* * * * * Different occupations may be taxed at "different rates. * * * * *The tax complained of* "may be onerous and apparently unequal with *the tax levied* "*on the business of other corporations* or companies. This "is a matter submitted to the judgment and discretion of "the legislature, and their conclusion must be regarded as "conclusive."

The next paragraph of the opinion of the State Supreme Court leaves no room for controversy as to the idea and purpose of the legislature in fixing the tax as an indivisable occupation tax for a single recognized business. Says the court (Record, p. 49):

> A construction which limits the tax to gross receipts derived from busines done between points, both of which are within the territorial limits of the State, *is more restrictive than the words and purpose of the statute import* The legislature knew that the appellant company operated extensive telegraph lines from places beyond, into, and through the State, and *intended to make the tax commensurate with the benefits and protection received from the government.* Receiving messages at offices located within the State for transmission and transmitting them without, is business done in this State, though the service may not be complete until the delivery to the sendee at some place beyond its boundaries. The statute does not purport to tax gross receipts not collected in Alabama, but by fair interpretation includes all receipts derived from business done in this State and actually received here, though the message may have to be delivered at or may be sent for delivery from some office without the jurisdiction of the State. Though thus construed, the statute is not an *unauthorized* interference with inter-state commerce.
>
> This question is fully and ably considered and discussed in the following cases: Western Union Telegraph Company *vs.* Richmond, 26 Gratt, 1; Western Union Telegraph Company *vs.* State, 55 Texas, 314; Western Union Telegraph Company *vs.* Mayer, 28 Ohio St., *supra;* Port of Mobile *vs.* Leloup, 76 Ala., 401, and is expressly decided in respect to a tax on the gross receipts of railroad companies, though consisting in

part of freights received for transportation of merchandise from the State to another state, or into the State from another, in State Freight Tax cases, 15 Wall, 284; Osborne *vs.* Mobile, 16 Wall, 479.

This construction of the Statute clearly establishes the invalidity of the entire tax.

In Leloup *vs.* the Port of Mobile, 127 U. S., 640, it was said by *this* court, page 645,—

> Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business.

and again, p. 647:

> But it is urged that a portion of the Telegraph Company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination

and as a summary of the rights of the State upon the subject of taxation of corporations engaged in inter-state commerce, concludes, pp. 648, 649:

> We may here repeat, what we have so often said before, that this exemption of inter-state and foreign commerce from State regulation does not prevent the State from taxing the *property* of those engaged in such commerce *located within the State* as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage, and the like.

The tax here complained of being an occupation or privilege tax, does not fall within those defined powers of taxation which are reserved to or which inhere in the several states.

We have not overlooked the case of Ratterman vs. The Telegraph Company, 127 U. S. 411, wherein it was held that the gross receipt tax imposed by the State of Ohio was void pro-tanto, but was enforcable to the extent, and in the proportion that the infra State business bore to the whole tax. That case differs materially from this in the character of the forum, and the nature of the pleading and practice, as well perhaps as in the nature of the tax, under the construction given the statute in question by the Alabama Supreme Court.

The Ratterman case was a suit in equity to enjoin the collection of the tax for Hamilton county only. A court of Equity will always uphold a legal tax and require its payment, though irregularly assessed, before it will give relief against the illegal portion of a tax-bill sought to be collected. In the Ratterman case there was no room for apportionment, the county auditor having assessed the receipts of the Telegraph Company made in the county. While in the case at bar the assessment is made for the whole state, and afterward apportioned among the several counties for taxation for state, county and municipal purposes. The apportionment presents a living issue, for while the *state* rate is the same through all of the counties, the apportioned assessment under the law becomes the basis of county and municipal taxation as well, and this may vary from nothing to five mills on the one hundred dollars of valuation for county taxes, and take a still wider range for municipal taxes. (Appendix B. p. XIV. Sec. 48.) For instance, if the whole or any considerable portion of the total gross receipts should be apportioned to Baldwin county, the Telegraph Company might have to pay only one mill on the hundred dollars for county purposes with no special or municipal tax, while, if the same apportionment were made to Mobile county, the company might have to pay a county tax of five mills, a special school tax of one mill and municipal taxes of thirteen and one-half mills. We say such result *might* be worked, because we do not think in the illustration that it is necessary to encumber this brief by a copy of Statutes to show that the results would in fact be as surmised.

It would hardly have been held in the Ratterman case that any portion of the tax was enforcable if the Statute of the state or the opinion of its Supreme Court had in terms declared that the tax in question was an indivisible occupation tax for the doing of the business of telegraphy, embracing in its intent and scope all interstate business.

The opinion of this court in the Ratterman case was squarely planted on the decision of this court in this case of The State Freight Tax. 15 Wall 232. In this last named case the facts were that there was a specific tonnage tax on the goods carried. Several companies might have participated in the carriage of a particular ton of freight, and it might have been carried for a longer or shorter distance, yet the tax was the same and only one tax was exacted. The court said p. 273, "This provision demonstrates that the tax has no reference to "the *business* of the company" * * * "There is still another "provision in the act which shows that the burden of the tax "was not intended to be imposed upon the companies desig- "nated by it, neither upon their franchises, their property, or "their business" * * * "it carries the tax over beyond the "carrier to the thing carried."

And again pp. 274, 275. "Considering it, then, as mani- "fest that the tax demanded by the act is imposed, not upon "the company, but upon the freight carried, and because car- "ried we proceed to enquire, &c.

The validity of the tax on the articles carried wholly within the state was disposed of without argument by court or counsel, and in the condition of the record was a dictum. (See points of counsel, pp. 148 to 271.) This branch of the question was disposed of in the following language, p. 282. "But while "holding this, we recognize fully the power of the State to tax "at its discretion, its own internal commerce and the fran- "chises, property, or business *of its own corporations. So that* "interstate, intercourse, trade or commerce be not embarrassed "or restricted—that must remain free."

The railroad gross receipt tax imposed by a State upon a railroad of its own creation was justified as and assimilated by this decision to a property tax. Says the court, 15 Wall, p. 284, on p. 294: "the tax is laid upon the gross receipts of the com-

"pany; laid upon a fund which has become the property of the "company, mingled with its other property, and possibly expended in improvements or put out at interest * * * "The tax is not levied until the money received for freights "and from other sources of income has actually come into "the company's hands. Then it has lost its distinctive character as freight earned, and become incorporated into the "general mass of the company's property."

The tax on gross receipts of a *domestic corporation* was sustained as a property tax by this court. A tax on the gross receipts of a *foreign* corporation is attempted to be sustained by the Alabama Supreme Court upon the ground that it is not a property but an occupation or privilege tax. As before stated, we are aware that the decision of this court has been drawn in question in the cases of The Steamship Company vs. Pennsylvania, as to its interstate aspect, but we recur to it for the purpose of showing the mind of the court as to the status of gross receipts as an element of State taxation at the time of the decision of The State Freight Tax Case, 15 Wall, p 232, which this court in the Ratterman case relies on for the basis of its opinion.

## THERE IS NO SITUS OF THE GROSS RECEIPTS OF A NEW YORK CORPORATION IN THE STATE OF ALABAMA FOR PURPOSES OF TAXATION, ALTHOUGH SUCH GROSS RECEIPTS MAY HAVE BEEN THE RESULT OF BUSINESS WHOLLY TRANSACTED WITHIN SAID STATE.

Postponing for the moment the presentation of the second point against the validity of the entire gross receipts, we will consider the third point as above set forth, as it follows more logically upon what we have last above said, to be brief.

If this court shall hold gross receipts to be a property tax, and justifiable as such where proper conditions exist, we respectfully submit that the situs of this property is at the domicil of the corporation, which by the record, p. 1, is shown to be the State of New York.

The assessment of the tax is made in May for the receipts of the previous year ending December 31st. Thereceipts for the months of January and February, &c., 1884 were not assessed until May and June 1885. These receipts were not presumably in the state of Alabama at the time of the assessment. They belonged at the domicil of the company in New York. If Alabama could in 1885 levy a tax on the gross receipts taken in by the Telegraph Company in January 1884 on business done wholly within the State, the State of New York could levy a tax upon the same gross receipts when transmitted to that office in March 1884, and if in the mean time the receipts of the Alabama offices should be concentrated in a superintendents office at Atlanta before transmission to New York, the State of Georgia could also levy the same tax, and all of this might be done in the year 1885, and the anomaly would be presented of the same property having at the same time separate situs for purposes of taxation in each of these states. The said receipts being the result of business done wholly within the State of Alabama, such triple taxation would not violate the inter state feature of the United States Constitution.

We think the question is disposed of by the dicision of this court in principles laid down in the case of the State tax on foreign held bonds, 15 Wall, p. 300; on p. 319, says the courts. "The power of taxation, however vast in its character, "and searching in its extent, is necessarily limited to subjects "within the jurisdiction of the State." We submit that these gross receipts whether they be actually paid over at the domicil, or are only in the condition of claims against the agents for an accounting for moneys received for account of the company, and not paid over, have the situs for taxation only at the situs of the property itself *at the time of the assessment*, or if not paid over or accounted for at the situs of the agents creditor, which is the domicil of the corporation. The specific money received, not being taxed as such while in the hands of the local agents. In the language of this court, p. 320, (Foreign Bond Case Supra,) as applied to foreign held bonds, "they can have no locality separate from the parties to whom they belong."

We can see no difference between gross income and net income in this respect—the portion of gross income which has been substracted and paid for current expenses being in the hands and ownership of the parties to whom the same has been paid.

### The tax is void in toto because being an occupation tax under the laws of Alabama, it infringes the constitutional powers of Congress to "establish post offices and post roads."

Owing to unforseen circumstances beyond our control we will not be able in this brief to amplify our views on the above and next succeeding point. We hope to be able to do so in oral argument or in a supplemental brief.

We insist that an occupation tax on a Telegraph Company which has been licensed by Congress to do a telegraph business, as provided by Section 5263 *et seq.*, of the United States Revised Statutes (Exhibit D, post), is as much in violation of that portion of the Constitution of the United States which vests in Congress the power to establish post offices and post roads as to all of its business, including that done wholly within the limits of a single State, as such tax is in violation of the constitutional clause which vests in Congress the power to regulate commerce among the several States, as to all inter-state business.

The power of Congress is not confined to the establishment of inter-state post offices and post roads. For the transmission of intelligence it may and does establish post offices and post roads wholly within a State. It would be no objection to the establishment of a post route between A and B within the State of Alabama that the post offices at A and B respectively had no other postal connection so as to make it possible for interstate intelligence to be transmitted over such route

Congress has made all railroads postroads without regard to their termini.

Congress has also expressly licensed all telegraph companies which shall comply with the terms of the Act, to build and operate lines and transmit intelligence thereover, on "*any* of the military or post roads of the United States," without regard to the interstate connections or absence of interstate connection of such post roads.

The terms upon which this privilege may be exercised are fixed by the acts of Congress. The price of a portion of the service, i.e., for the government, is regulated by the *Postmaster General*, while, for the time being, the price of the service rendered to the public generally is left to the convention of the parties. The government at the same time securing to itself a potential right of property in the lines and instruments of the licensee.

The attempt of the state to impose other restrictions, including occupation taxes, is, we think, a clear obstruction to the untrammeled rights conferred by Congress on those whom it has legally authorized to do the business of transmitting intelligence by wire.

Could the Postmaster General have been authorized by the constitutional power of Congress to employ the city postal carriers in delivering the messages of the Western Union Company and in collecting the tolls, as recently proposed? And if so, why could not such carriers also receive all messages for the Western Union Company, collect rates to be fixed by said company, and the same to account for? In such case, would the post office be said to be any more an instrument or agency of the telegraph company in the delivery of messages, than the telegraph company could be properly regarded as an instrument of the Post office department in the transmission of intelligence? Does not the nature of the thing done and the authority under which it is done, impress upon the telegraph business its legal character and status, or is such character fixed by the fact of ownership and the character of the party who regulates the compensation to be paid for the service performed?

We respectfully submit that when the transmission of intelligence by telegraph is made the subject of Congressional action, no state interference can be lawfully permitted, no matter how extensive or limited, territorially speaking, such business may be, nor how much or how little interference in the practical operations of the business may be permitted or enjoined upon public officers and retainers, or that may be left to the officers and servants of the owners of the property.

An express warrant for these conclusions, we think, is found in the following decisions of this court, viz:

Pensacola Tel. Co. vs. The Western Union Tel. Co., 96 U. S., p. 1;
The Tel. Co. vs. Texas, 105 U. S., 460;
Leloup vs. The Port of Mobile, 127 U. S., 640;
Moran vs. the City of New Orleans, 112 U. S., p. 69.

## THE TAX OF TWO PER CENT. WAS CLASS LEGISLATION AND AN UNJUST DISCRIMINATION AGAINST THE CORPORATIONS ENGAGED IN THE TELEGRAPH BUSINESS, AND CONSEQUENTLY A VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The tax in question is levied only upon telegraph and a few other *Companies* named (Appendix A, p. VII, Sec. 6), and is not imposed upon individuals or other persons doing the same business.

Only a few Companies and callings are taxed at as great a rate as two per cent. on their gross receipts (Appendix A.)

We contend that this is class legislation and an unjust discrimination, obnoxious to that portion of Article XIV, Sec. 1 of the Constitution of the United States, which provides as follows, viz: "Nor shall any State deprive any person of life, "liberty or property, without due process of law; nor deny to "any person within its jurisdiction the equal protection of the "laws."

We have shown wherein the discrimination consists, and will have to content ourselves for the present in citing the opinions of Mr. Justice Field and Judge Sawyer, in the cases of the County of San Mateo vs. Southern Pacific Railroad Company, 13 Federal Rep., p. 723, and note, and of San F. and N. R. R. vs. Dinwiddie. Ibid, p. 789,

Respectfully submitted,

GAYLORD B. CLARK,
THOS. G. JONES.

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# APPENDIX A.

## AN ACT

To levy taxes for the use of the State and counties thereof.

SECTION 1. *Be it enacted by the General Assembly of Alabama,* That the following rules for the taxation of persons and property are hereby established, to-wit:

1. The term, real property, shall be held to mean and include, not only land, city, town and village lots, but all things thereunto pertaining, and all structures and other things so annexed or attached thereto as to pass to a vendee by the conveyance of the land or lot.

2. The term "personal property" shall be held to mean and include all things other than real property which have any pecuniary value, and moneys, credits, investments in any bonds, stocks, joint stock companies, or otherwise.

3. The term "moneys," or "money," shall be held to mean and include gold, silver and other coin, bills of exchange, bank bills or other bills or notes authorized to be circulated as money, whether in possession or on deposit subject to the draft of the depositor, or the person having the beneficial interest therein, on demand.

4. The term "credit" includes every claim and demand for money, labor, merchandise, or other valuable things, and money and property of any kind secured by deed of trust, mortgage or otherwise.

5. The word "person" or "party" or other word or words importing the singular number, shall be held to include

firms, companies, associations and corporations; and all words in the plural number shall apply to single individuals in all cases in which the spirit and intent of this chapter require it. All words importing the masculine gender, shall apply to females also; and all words importing the present tense shall apply to the future also.

* * * * * * * *

SEC. 4. All taxes, unless otherwise herein directed, shall become due and payable on the first day of October in each year, and shall become delinquent if not paid on or before the thirty-first day of December in each year, except in cases where parties are about to remove from the county, and except also poll taxes, which shall become delinquent if not paid on or before the first day of November in each year, after which last date as to poll taxes, the tax collector may proceed to enforce payment by garnishment, or the seizure and sale of personal property as herein provided for the collection of other delinquent taxes.

SEC. 5. For the use of this State, and to raise revenue therefor, there is hereby levied an annual tax upon the property and subjects herein declared, as follows, that is to say sixty cents on the hundred dollars of the value of:

1. Each and every piece, parcel, tract or lot of land in this State, including therein all things pertaining to said piece, tract, parcel or lot of land, and all structures and other things so annexed or attached thereto as to pass to a vendee by a conveyance of said realty, and on every separate or special interest in any land, such as mineral or timber, or other interest, when said interest is owned by a person other than the owner of the land or soil.

2. All wharves and wharf boats, toll bridges and ferries, turnpikes and all passes, channels or canals where tolls are charged, street railroads, printing presses and materials or their value.

3. All steamboats, vessels and water craft of every name

and kind, excepting such as are engaged in foreign commerce, to be assessed and collected at the port in this State where such steamboats, vessels and water crafts are enrolled, if practicable, otherwise, if not enrolled at any port under the laws of the United States, then at any place or landing where the same may be found.

4. All stocks of goods, wares and merchandise, the assessment to be upon the average amount on hand during the preceding year, but the amount so assessed shall in no case be less than the capital actually employed in the business; and this shall include all goods, wares and merchandise kept on plantations or elsewhere, or by railroad companies, or manufacturing companies. or other associations, corporations or persons for sale or to be dealt out to laborers or employees for profit, or on account of their wages, and shall include all goods, wares and merchandise offered for sale by any person commencing business subsequently to the first day of January of the current year. * * * * * *

5. All household furniture, libraries, jewelry, plates and silverware, ornaments and articles of taste, pianos and other musical instruments, paintings, clocks, gold and silver watches, and gold safety chains; all wagons or other vehicles; all mechanical tools and farming implements; all dirks and bowie knives, swords, canes, pistols and guns; all cattle, horses, mules, studs, jacks and jennets and race horses; all hogs, sheep and goats.

6. All money hoarded, whether in custody of the owner or on deposit in bank or elsewhere; but this shall not include money on deposit by persons engaged in any regular business in this State, for use in such business.

7. All moneyed capital, that is all money loaned, and solvent credits or credits of value, from which credits the indebtedness of the taxpayer shall be deducted and the excess only shall be taxed; and all moneys employed in the business of advancing or loaning on stocks, bonds, bullion, bills of

exchange, or promissory notes or in the purchase thereof, or in the discount of bills of exchange, promissory notes or bonds, or in dealing in stocks, bonds, bullion, bills of exchange or promissory notes, whether by individuals, companies, corporations or associations, except when the money so employed is otherwise taxed as capital.

8. Each share of any bank, banking company or association, and located within this State, whether held by residents or non-residents of this State, the same to be assessed and collected in the county and in the city, town or village wherein such banking association is located, and not elsewhere, and to be paid by each such banking association for the shareholders thereof. All shares of national banks, or banking associations, organized under the laws of the United States, according to the actual or fair market value of such shares, whether held or owned by residents or non-residents of this State, to be assessed and collected in the county and in the city, town or village wherein such national bank or banking association is located, and not elsewhere, and to be paid by each such bank or banking association, for the shareholders thereof. * * * * * * *

9. The capital stock of all corporations, companies or associations created or existing under any law or enactment in force in this State, except such portions of the capital stock as may be invested in property which is otherwise taxed as property, the same to be paid by the corporation, company or association, but when such corporation pays the taxes in this act levied upon the shares into which its capital stock is divided, or the same is paid by the shareholders, said corporation shall only be required to pay the taxes levied upon the real and personal estate owned by such corporation, unless the investments of such corporation be otherwise herein taxed.

10. All investments in bonds, except bonds of the United States and this State, and such other bonds as are not by law

taxable; Provided, however, that all capital invested in bonds or currency which are exempt from taxation shall be liable to be taxed under this section should such capital, at any time during the year, be reconverted into money, bonds or property which is taxable, unless it be made to appear by the party thus reconverting such capital that the money, bonds, or property into which such re-conversion may be made has been assessed for taxes for such year.

11. The roadbed, track, and all other real and personal property of railroads.

12. All dividends declared or earned, and not divided by incorporated companies doing business in this State.

13. All other property, real and personal, not otherwise specified herein.

SEC. 6. There shall also be assessed by the assessor in each county, on the following subjects and at the following rates, to-wit:

1. On the gross amount of sales at auction, made in or during the tax year preceding the assessment of goods, wares or merchandise owned by non-residents, each auctioneer shall be assessed and shall pay a tax of one-fourth of one per cent., and a like tax on all sales made by him of property owned by citizens of this State, which has been imported into the State and sold at auction before the same has been assessed for taxes as other property; but on sale of goods, wares, merchandise and fruits by cargo, the rate of taxation shall be one-eighth of one per cent.

2. On the gross amount of premiums (after deducting therefrom the expenditures, losses paid and returned premiums) received from their business in this State during each tax year by any life, fire or marine insurance company not chartered by this State and doing business herein by agents or otherwise, at the rate of one per centum. Each agent in this State of any insurance company organized under the laws of any other State or country and doing business in this State, shall annually, in

the month of January, return the assessor of the county in which such agency is located, a sworn statement of the gross receipts of such agency for the year ending on the first day of that month, including all notes, accounts and other things received or agreed upon as a compensation for insurance at such agency, with a statement of expenditures, losses paid and returned premiums, and the company shall be charged with taxes at the place of such agency, on the amount so returned, and the agent shall also be personally responsible for such taxes, and may retain in his hands a sufficient amount of the company's assets to pay the same, unless the same shall be paid by the company. Any agent or company refusing or failing to make returns within the time prescribed by law, or refusing to pay the amount assessed as tax, shall forever be debarred from doing business in this State.

3. On the gross amount of premiums received from their business in this State during each tax year by any insurance company chartered or organized under any of the laws of this State, one per cent. on the gross amount of premiums, less the expenditures, losses paid and returned premiums; but in the case of life insurance companies chartered by or organized under any of the laws of this State one per centum on the gross amount of premiums, less the expenditures, reserved fund, returned premiums and losses paid.

4. On the gross amount of commissions after deducting expenses for carrying on such business, or sums charged and received during such tax year by any factor, broker, commission merchant or other merchant or dealer in any kind of property, or auctioneer in buying, selling or for any other act in the course of their business for a commission or compensation by bale, sack, package or otherwise, and upon the gross commissions received by insurance agents as such, during the tax year, at the same rate that property is taxed.

5. On the gross receipts during such tax year of all cotton pickeries, and from the storage of cotton or other merchandise

or produce, and on the gross amount of income of all gas works, water works, ferries, toll bridges, public mills and gins used in ginning for tolls, after deducting the expense of carrying on such business, at the rate of one per cent.

6. ON THE GROSS AMOUNT OF THE RECEIPTS BY ANY AND EVERY TELEGRAPH, TELEPHONE, ELECTRIC LIGHTS AND EXPRESS COMPANY DERIVED FROM THE BUSINESS DONE BY IT IN THIS STATE, AT THE RATE OF TWO DOLLARS ON THE HUNDRED DOLLARS.

7. On the gross income of sleeping car companies, corporations or associations doing business or running or causing their cars to be run in this State, two per cent. exclusively for the use of the State.

8. On the gross receipts derived from business in this State, by each and every person, company, association or corporation of this or any other State, who by themselves or agent, is engaged in the business of loaning money or other thing of value, upon mortgage or lien on any property in this State, two per cent. per annum; each such person, company, association or corporation so carrying on said business, and when the said business is conducted by an agent or agents, each such agent must annually on the first day of April return to the assesor of each county wherein such business is carried on a sworn statement of the gross receipts from such business in said counties respectively, for the year preceding, including all commissions, notes, accounts, interest and other things received or agreed to be received by such party or by such report as compensation for or consideration of advancing the money or thing so loaned. or for negotiating or effecting such loan or loans and preparing or causing to be prepared the mortgage, contract or agreement, by which the security or lien is evidenced, or as compensation for the use of the money or thing so loaned, lent or advanced; and each such agent shall be personally responsible for the amount of the tax hereby levied and which may have been assessed under this section upon the said gross receipts of the persons, company, association or corporation, for which

or in whose interest such agent may be acting; provided the tax hereby levied shall not apply to the business of such person, companies, associations or corporations which are assessed for taxation upon their capital, or in case of corporations whose shareholders are taxed upon their shares in the capital stock thereof.

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SEC. 18. *Be it further enacted,* That nothing in this act contained shall be construed to authorize or continue in force, after December 31, 1884, (except as expressly provided in this act) any tax upon salaries, gains or incomes, and all laws and parts of laws imposing or authorizing such a tax, shall be of no force after December 31. 1884.

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Approved December 12, 1884.

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# APPENDIX B.

## AN ACT

To provide for the assessment and collection of taxes for the use of this State and the counties thereof, and to define the duties of officers engaged about the said assessment and collection of taxes.

*Be it enacted by the General Assembly of Alabama, as follows:*

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SEC. 9. *Be it further enacted,* That the taxable property of corporations which are not otherwise regulated as to taxation by the revenue laws of this State, shall be returned to the assessor by the president or chief officer of said corporations with the estimated value thereof. In making such return and list of the property of said corporation, the said officer so required to make the same, shall state the market value of the capital stock of said corporation and the items of property in which said capital is invested, with the value thereof, and the number of shares into which the capital stock is divided, with a statement of the par value of such share and the actual market value of each such share. If such corporations make such list and return and pay to the tax collector the taxes assessed or which would be by law due upon said property so listed and returned, then no tax shall be demanded or collected of the holders of the shares into which the capital stock of said corporation may be divided.

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*Sec. 13. The governor as president, the secretary of state, the auditor and the treasurer of the State shall constitute a board for the assessment of the items of property of railroad companies returned to the auditor of the State, and a majority of such board shall constitute a quorum;* such board shall meet at the office of the auditor annually, on the first Wednesday in May, and if there should not be a majority of the board present at that time, the auditor shall immediately notify the governor of the fact, who shall appoint another day of meeting as early as practicable, which appointment shall be notified by the auditor to the other members of the board, and should any further failure to meet occur, the governor shall have power and is required to repeat the appointment until a meeting of a quorum is effected. *When the said board has assembled as by this section required, they shall proceed to examine and pass upon the returns by the previous section required, and if no such returns have been received, then to consider and examine the values as assessed by the auditor, and decide upon the valuation to be charged for the purposes of taxation against said railroad companies on the property hereinbefore named;* and in case no return has been made by or on behalf of any railroad companies, said board may add to the assessment which it may adopt a penalty of not more than fifty per cent. thereon.

If, at any meeting, the board shall not have in its possession satisfactory data upon which to base an estimate of the value of the property with the assessment of which it is charged, or from any other cause, is not able to make or complete its assessment, it may adjourn for any interval of time which may in its opinion be requisite to accomplish its object, and it shall have power to call upon any officer of any railroad for any records, books or documents of any description, or for answers to any interrogatories which it may deem necessary to an intelligent discharge of its duties; and it shall also be empowered to require the attendance of any officer of any railroad, or any other person, when testimony of such persons may to it seem material in the case.

The valuation of the property of railroad companies shall proceed upon the same principles as the valuation of every other species of property; that is to say, the valuation of such property shall be had exclusively upon the consideration of what a clear fee simple title to such property would sell for under the conditions under which that character of property is most usually sold.

The attorney-general of the State shall be present at every meeting of the board to represent the interests of the State. It shall be his duty to assist the board with his advice, or otherwise, and to make such suggestions and representations to it as he may deem advisable to protect the interests of the State.

The board shall keep a record of its proceedings, and when the members are equally divided upon any question, the attorney-general shall decide the point and in every case in which he dissents from the conclusion of the majority of the board he shall spread upon the records his reasons fer such dissent. The absence of the attorney-general shall be sufficient ground for adjourning the session of the board. The minutes shall also show what members of the board were present.

SEC. 14. *When said board shall have acted upon said assessments and decided upon the amount of value to be charged against said railroad companies respectively, the auditor of this State shall notify the assessors of each county through which said road runs of the number of* miles of track and the value thereof, in his county, and the proportionate value of the property of said railroad company taxable in his county, *to be entered in the book of assessments in his county in addition to other real property, fixtures, machinery, tools and other property belonging to said railroad company* in his county, to be assessed as other property of like kind owned by private citizens of his county; *Provided that the auditor shall send to the superintendent of each railroad so assessed, by the board as aforesaid, copies of his notification as sent to the county assessors, of the railroad of which said superintendent has charge.*

SEC. 15. THE PRESIDENT, SECRETARY, AUDITOR OR MANAGING AGENT IN THIS STATE OF EVERY TELEGRAPH COMPANY WHOSE LINE OR ANY PART THEREOF, IS WITHIN THIS STATE, MUST ANNUALLY, ON OR BEFORE THE FIRST DAY OF APRIL IN EACH YEAR, UNDER OATH MAKE RETURN TO THE AUDITOR OF THE STATE OF THE NUMBER OF MILES OF TELEGRAPH WIRE IN THIS STATE BELONGING TO IT AND THE VALUE THEREOF, THE NUMBER OF POLES, batteries, instruments and articles of all kinds connected with its business and the value thereof, specifying the several counties in which said property is situated, and the value thereof in each of said counties, *and must also in said return report the* GROSS RECEIPTS *of said company gained from its business done in this State during the year, and if said companies or any of them, their officers or agents, fail to make returns as herein required by the time specified, the auditor must ascertain the income and value of said property from the best information he can obtain. And said auditor must make report of said returns, or failure to return as herein required,* *to the board for the assessment of property of railroad companies. Said board is hereby directed to proceed and deal with said returns and property as in the case of railroads*, and for failures to make returns as herein required, may add to the assessment by the auditor a penalty of not more than fifty per cent. *Upon the valuation being made by said board, the auditor must notify the result to the assessors of the several counties wherein said property lies, as directed in the case of railroads, and said assessors must thereafter deal with the matters in their several counties, and with any other taxable property of said companies in their counties, as they are directed to proceed in the case of railroads.*

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SEC. 18. The president, secretary, auditor, manager or agents of all railroad, telegraph, sleeping car and express companies, owning real estate in any county in this State, shall make out and deliver to the assessor of each county wherein the property is situated, on or before the first day of May of each year, a full and complete list of all lands and town lots, by section, township and range, and by lot and block, of all lands or lots owned or held by them subject to taxation by the laws of this State.

* * * * * * * *

SEC. 27. The tax assessor must make a condensed statement of the assessments provided for in this act, which shall be entered in a book suitably ruled and substantially bound, which book shall show in separate columns, the names of persons assessed in each precinct in alphabetical order, the number of acres of land assessed to each person, the value of the same, together with any other real estate, the number, amount and value of all other taxable property, and property exempt from taxation, and the whole number, amount and value of each separate item entered therein, together with the amount of State tax charged to each taxpayer, shall be extended and footed up, the footings carried forward from page to page, and the total amount of the assessment footed up for the county, which book of assessment shall be delivered to the Probate Judge of the county by the first Monday of July of each year; the assessor shall also keep a list and make a book containing a list alphabetically arranged of all persons liable to poll tax in each precinct, which shall be delivered to the Probate Judge by the first Monday of July. And after the county taxes shall have been levied by the court of county commissioners as provided by law, it shall be the duty of the tax assessor, and he is hereby required to compute such county taxes, and enter in said tax book of assessment the amount of county taxes due by each tax payer, opposite his name, and otherwise complete such tax book according to law and the orders of the court of county commissioners.

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SEC. 45. After the adjournment of the said term of the second Monday in August of the county commissioners, and after said court has made the levy on said assessments for county purposes, as in this act provided, and the tax assessor has corrected his book as herein provided, in accordance with the rulings and decisions of said court of county commissioners as hereinbefore directed, and after the said tax assessor, as it is hereby made his duty to do, shall have extended opposite the name of each tax payer the amount of State tax, county tax and of other tax, if any, with which such tax payer is chargeable, and shall have footed at the bottom of each page the aggregate amount of each of said taxes, carrying his footings from page to page, and showing in conclusion the aggregate of each of such taxes to be raised in the county, the presiding officer of said court shall certify upon said book of assessments that the same have been examined, corrected and allowed by said court of county commissioners; that the amount of the State tax is $——, the amount of county is $——, the amount of special tax is $——, the total amount of the poll tax is $——, and thereupon said certificate shall be the warrant to the tax collector of the county to proceed to collect the taxes in the manner directed by law so ascertained.

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Sec. 48. It shall be the duty of the said court of county commissioners at the said term of the second Monday in August to levy the amount of taxes required for expenses of the county for the current year, not to exceed one-half of one per cent. upon the values of said counties assessed for revenue to the State as shown by the book of assessments after the same shall have been corrected as herein provided; Said court may also for county purposes assess persons subject to license tax such per centage upon such license in addition to the amount imposed by the State as in their judgment may be necessary, not exceeding fifty per cent.

* * * * * * * *

Sec. 135. In all cases, when by the laws of this State, taxes are levied on the gross or net receipts of any person, company, corporation or association doing business in this State by an agent, such agent shall be personally responsible for the amount of tax or taxes imposed by law on such receipts, and the tax collector may proceed to collect the same by garnishments, or the seizure and sale of the personal property of such agent, as if said tax or taxes were assessed against such agent individually.

Sec. 136. In all cases where a tax payer becomes insolvent or makes a general assignment of his property for the payment of his debts, or the estate of a decedent is, or becomes insolvent, and the taxes assessed against such person or party, or against any part of his estate, are in whole or in part unpaid, the amount so unpaid shall be a preferred claim, and shall be paid by the assignee or personal representative of such party, out of the money first recefved by said assignee, or personal representative, before any other debt or claim is paid.

And it is hereby enacted that *from and after the first day of January in each year, the State shall be and is hereby* *invested with a lien upon each and every parcel of property, both real and personal, for the payment of the taxes which may be assessed against the owner during that year for the revenue of the State; and the county shall have a like lien for the payment of the taxes, against such property which may be assessed thereon during that year for the use of the county.*

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(Approved February 17, 1885.)

# APPENDIX C.

## CONSTITUTION OF ALABAMA, CODE, PAGE 43.

### ARTICLE XI.

§ 1. All taxes levied on property in this State shall be assessed in exact proportion to the value of such property; *Provided, however,* The general assembly may levy a poll-tax, not to exceed one dollar and fifty cents on each poll, which shall be applied exclusively in aid of the public school fund in the county so paying the same.

§ 4. The general assembly shall not have the power to levy, in any one year, a greater rate of taxation than three-fourths of one per centum on the value of the taxable property within this State.

§ 6. The property of private corporations, associations, and individuals of this State shall forever be taxed at the same rate: *Provided,* This section shall not apply to institutions or enterprises devoted exclusively to religous, educational, or charitable purposes.

# APPENDIX D.

## REVISED STATUTES OF UNITED STATES.

SEC. 5263. Any Telegraph Company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines or telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams of waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

SEC. 5264. Any Telegraph Company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to preemption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

SEC. 5265. The rights and privileges granted under the provisions of the act of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes," or under this title shall not be transferred by any company acting thereunder to any other corporation, association, or person.

SEC. 5266. Telegrams between the several departments of the government and their officers and agents, in their tranmission over the lines of any Telegraph Company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall annually fix. And no part of any appropriation for the several departments of the government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

SEC. 5267. The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under provisions of the act of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," or under this title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

SEC. 5268. Before any Telegraph Company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law.

SEC. 5269. Whenever any Telegraph Company, after having filed its written acceptance with the Postmaster General of the restrictions and obligations required by the act approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes," or by this title, shall, by its agents or employes, refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act, or by this title, or by provisions of section 222, title "THE DEPARTMENT OF WAR," authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and force of storms, such Telegraph Company shall be liable to a penalty of not less than one hundred dollars and not more than one thousand dollars for each such refusal or neglect. [To be recovered by an action or actions at law in any district court of the United States.]

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# Supreme Court of the United States.

## OCTOBER TERM, 1889.

## No. 115.

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,
*vs.*
E. A. O'NEAL, GOVERNOR, ET AL., EX-OFFICIO, COMPOSING THE STATE BOARD OF ASSESSMENT OF ALABAMA, DEFENDANTS.

*In Error to the Supreme Court of the State of Alabama.*

## SUPPLEMENTAL BRIEF

OF GAYLORD B. CLARK AND THOS. G. JONES,
FOR PLAINTIFF IN ERROR.

# Supreme Court of the United States.

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OF GAYLORD B. CLARK AND THOS. G. JONES,
FOR PLAINTIFF IN ERROR.

In addition to what we have said in the first brief in reference to the gross receipts of 1884 not having a situs for taxation in Alabama in May, 1885, we wish to cite the case of Fargo vs. Michigan, 121 U. S. p. 230; and especially what is said on page 243.

In the case of the Pensacola Telegraph Company vs. the Western Union Telegraph Company, 6 Otto, p. 1, this court said that the act of July 14, 1866, was not only a legitimate regulation of commercial intercourse among the States, but that the same "is appropriate legislation to execute the powers "of Congress over the postal service." And we might add, that the telegraph is an instrumentality provided by the government for communication between its public officers, and for the dissemination of its public reports not only between the district of Columbia and the various States and Territories of the union, but also between points within the limits of particular States or Territories.

We have shown that a State could not demand a license where the telegraphic business was entirely interstate. It needs no argument to show that a State cannot demand a privilege tax from one who might be employed by the United States in transmitting messages between the officers of the Federal government although such business might be found to consist in the transmission of messages between such officers within the limits of a particular State. It would be lawful for the government of the United States to employ such agencies, and no State could place any condition upon the lawful exercise of such business.

And by a parity of reasoning it seems to us that the State is equally restrained from interfering with any agency established by congress for the transmission of intelligence between communities or individuals, the proper function of a postal system, although the business of such particular agent might be confined in its operations within the limits of such State. The language of the constitution of the United States is that congress has power to establish postoffices and post roads. This power is exclusive in congress, and no State has the right to establish a post office or post road.

Postoffices and post roads are established for the purpose of enabling the public and members of that public to communicate with each other. That congress considered that the act of July 14, 1866 was an exercise of this particular constitutional power is evidenced by the fact that the right is conferred on telegraph companies only as to post roads and military roads of the United States; roads over which, as to the transmission of intelligence, congress has an exclusive dominion.

It would probably be admitted that the officers or appointees of the Federal government while engaged in the postal service of the government could not be subjected to the payment of a privilege tax for undertaking the duty which their employment enjoined upon them. But it may be contended that when private individuals or corporations undertake for a consideration the business of transmitting intelligence between points wholly within a State the occupation is in no sense the exercise of a governmental function, for the reason, among others, that the government is not the recipient of fees and emoluments which accrue from the performance of such service.

In answer to this we respectfully submit that it is immaterial what system or regulation may be adopted by the government in establishing a postal service, and it is equally immaterial as to whether the government receives the revenues derivable therefrom, it is none the less the government's action, that private parties are authorized or licensed to do those things which Congress has the sole right to authorize and license them to do.

Suppose that Congress, in exercising the constitutional power referred to, should have provided that certain common carriers who might comply with the conditions prescribed by law, similar to those imposed upon Telegraph Companies in the case we are considering, should have the right to do the business of transmitting the mails at a reasonable compensation, to be charged by them and collected from the persons who should avail of their services in particular cases. Could it be successfully contended that if such carrier were to comply with the conditions imposed, and would thereupon undertake to do the business in question, that the State could step in and demand as a prerequisite to their engagement in such business, that they should first pay the State and every municipality such license as the State might from time to time exact? would this Court have any hesitation in saying that Congress had the authority to confer the power, and that the State had no right to obstruct any of those who undertook the business in its free and untrammeled performance? In other words, could the State, after Congress had conferred the right and declared that it should be lawful, step in and say, that notwithstanding the congressional license, the business is unlawful unless certain things are done by the licensee in conformity with its unbridled desires. While it is possible that the State may say to the common carrier that it should not engage in the carriage of passengers and freights between points within the the State without first paying a license, although carrying the mails of the United States, because Congress has no power over the carriage of passengers and goods entirely within the limits of the State; yet, when it comes to Telegraph Companies, we find that they are not engaged in any business over which Congress has not full and complete control.

The constitutional power which we have invoked is sufficient to cover all that may be done by a telegraph company whether wholly within or partly without the limits of a particular State. The question of establishing a governmental postal telegraph system—that is, one in which the government shall control or shall receive all the revenue derived from the conduct of the system—is being agitated in the American Congress. No lawyer doubts the right of the government to control this particular method of transmission of intelligence. It has also been intimated, as a possible feature of such legislation, that instead of the government constructing and owning the telegraph lines, it may contract with the existing telegraph companies for the performance of such service. Supposing such a contract should be made, would the peculiar terms of the contract in any sense affect the question as to whether or not the telegraph postal service was under the control and power of the Federal government, and that its establishment was the exercise of constitutional authority? If the terms of the contract providing the manner in which such service was to be performed would not affect the question of the validity of the contract itself, it being all sufficient that the government had undertaken to declare the telegraph to be a postal system, would a contract containing the peculiar provisions of the act of 1866 in any way change the matter? Suppose the Postmaster General, acting under authority, should execute a formal contract which would say to the Western Union Telegraph Company, you shall undertake to transmit all messages which shall be delivered to you by the public or the government; you shall receive for such service so much per message, or so much per word, for all messages transmitted for the government, or such compensation as the Postmaster General may from time to time fix; but as to messages sent by individuals you may charge for them reasonable rates, to be collected of the senders, and you shall stipulate in this contract that whenever the government desires to manage the property by its own appointees they may take your plant and pay you a sum to be fixed by arbitrators and cut off your revenue as authorized by this contract; is not this the very contract under which the Western Union Telegraph Company is now conducting its business?

Different, it is true, in form from an ordinary contract inter parties, but having all the elements of one, being a grant upon conditions performed and for a valuable consideration. Can any one doubt the power of the government to establish a telegraphic postal system between Montgomery and Mobile, Ala? To place the machinery and the working of it in private hands, and yet have it remain to all legal intents and purposes as a part of the postal system of the United States? If so, by what right can the State of Alabama interfere with the exercise of this business? And yet we respectfully submit that this is exactly what the Federal government has done in its legislation on the subject of Telegraph Companies, and it is this exercise of Federal power that the occupation or license tax laws of Alabama conflict with and tends to destroy.

If the State may lawfully demand two per cent., they may demand seventy-five or one hundred per cent. of the gross receipts, which would probably be two hundred or even a greater per centage of the net receipts or income, thus making the telegraph company operate its business at a loss, or cease to do any business between points within a State. Could a more effectual way be found to throttle or destroy a business licensed by Congress. In such case what would then become of the Government's effort to secure cheap telegraphic facilities between the commandant of the Mount Vernon Arsenal in Mobile county and Mobile, Fort Morgan, or any other strategic point? How could the Government's telegraphic intelligence on important military or naval maneuvers, or weather observations be communicated between Jacksonville on the Atlantic and Pensacola on the Gulf, if the State of Florida may appropriate by way of an occupation tax all or a greater portion of the revenues derived threfrom? Would not the efforts of the

Government to secure telegraphic intelligence in these important public matters be absolutely nullified?

The question cannot be answered without furnishing an argument against the tax in question.

Respectfully submitted,

GAYLORD B. CLARK,
THOS. G. JONES.
For Plaintiff in Error.

(over)

In addition to the Statutes set forth in Appendices to the first brief, we subjoin the following extract from the United States Revised Statutes:

## APPENDIX E.

SEC. 3964. The following are established post roads:

All the waters of the United States, during the time the mail is carried thereon.

All railroads or parts of railroads which are now or hereafter may be in operation.

All canals, during the time the mail is carried thereon.

All plank roads during the time the mail is carried thereon.

The road on which the mail is carried to supply any court house which may be without a mail, and the road on which the mail is carried under contract made by the Postmaster General for extending the line of posts to supply mails to postoffices not on any established route, during the time such mail is carried thereon.

All letter carrier routes established in any city, or town for the collection and delivery of mail matters. [See sec. 2476.]

# Supreme Court of the United States.

No. 1066.

OCTOBER TERM, 1886.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiffs in error,

vs.

E. A. O'NEAL, GOVERNOR, *et al.*, CONSTITUTING THE STATE BOARD OF ASSESSMENT OF ALABAMA, Defendants in error.

ERROR TO THE SUPREME COURT OF ALABAMA.

## MOTION TO ADVANCE.

### *Statement*

The executive officers of the State of Alabama, including the Governor, Treasurer, Secretary of State, Auditor, and Attorney-General, acting as the State Board of Assessment, in July, 1885, assessed the taxables including the gross receipts from business done in Alabama, of the W. U. Tel. Company for the year 1885. The company applied to the Circuit Court of Montgomery county for a *certiorari* to the Board of Assessment commanding the Board to certify its record into the Circuit Court and praying that on final hearing the assessments against it be quashed or corrected, &c., on the ground, among others that the statute of Alabama, as construed by the Board, levying a

tax on the gross receipts of telegraph companies and persons operating telegraph properties, without regard to whether the messages, from which the receipts were had, were transmitted wholly within or partly within and partly without the State of Alabama, was a regulation of or impost on inter-State commerce, and therefore obnoxious to the Constitution of the United States. The writ was issued, and on the hearing the Attorney-General of Alabama moved to deny the petition and dismiss the writ. This motion was granted and judgment entered according. From this judgment an appeal was prosecuted to the Supreme Court of the State, and an order made, the purpose of which was to supersede and restrain the collection of the tax until a final disposition of the case. The State Supreme Court affirmed the judgment of the lower court, and the case is now in this court on a writ of error duly sued out and served within ten days after the rendition of the judgment complained of upon a bond conditioned to pay all costs and damages, in all respects as required by Sections 1000 and 1007, Revised Statutes of the United States, which was allowed and approved by Geo. W. Stone, Chief Justice of the Supreme Court of Alabama.

And now comes the Attorney-General of Alabama, for the State of Alabama and representing the defendants in error, and moves the court to advance this cause on its docket, and to set the same down for argument at some day of its present term for the following reasons—that is to to say:

The State of Alabama is the real defendant in error in this cause. The parties defendant nominally on the record had no interest in the matter in controversy except as the agents of the State, even at the inception of this proceeding, and having discharged their functions as such agency of the State government, they have now no interest whatever to be affected by the judgment of this court. They are in strictness not even nominal parties. The purpose of the writ being to review the action of this Board sitting as a *quasi* court to determine certain questions of valuation, the parties to the *record* made by this court and here sought to be reviewed are the State of Alabama on the one side and the Western Union Telegraph Company on the other side and the necessary relation of the Board to

the case ceased when it certified its record into the court of review. And the State government is embarrassed in its operations by the pendency of this suit and by the delay resulting from awaiting the regular call of this case on the docket, by reason of the following facts:

1. Not only the gross receipts of the plaintiff in error, the validity of the tax on which this court is asked to determine, but all the taxable property of this company in Alabama is involved in this case and its pendency affects the tax officers in 43——counties in Alabama and renders it impossible for any of these 43——officers to comply with the laws of the State in relation to the settlement of their accounts without making themselves personally liable to the plaintiff in error—contingent upon the reversal of this cause—while on the other hand these officers are personally liable to the State of Alabama and to each of their counties unless they comply with the State law, and thus incur this contingent liability to the plaintiff in error.

2. The plaintiff in error, under protest and with notice of suit in each case, has paid to the several tax collectors of the counties above referred to the amount apportioned and certified to them respectively. These collectors have thus incurred a liability to the plaintiff in error, to meet which they assert the right to retain the amounts so received. But the laws of the State require that this money shall be paid into the treasury, and a failure to so pay not only fixes a liability on the collectors, but is ground for their summary deposition from office. This state of facts greatly embarrasses the administration of the revenue laws of the State and will result in a multiplicity of suits either by the plaintiff in error or the State, all of which may be relieved and avoided by a speedy adjudication of this case.

3. The questions involved in this case are of public and general concern in Alabama, and they involve not only the gross receipts of this company, but of all telegraph companies doing business in Alabama, of which there are several, and of all telephone companies, and sleeping car companies, and express companies, and of all persons engaged in either of these businesses in Alabama. The revenue officers of the State

have already been enjoined at the suit of a sleeping car company, pending in a court of the United States and involving this question. The continued pendency of this case, the unsettled state of the law on this point, is embarrassing to the State government in the execution of the law imposing this tax and a speedy adjudication of this case will relieve this embarrassment as to all these properties, determine the suit above referred and prevent the institution of others.

4. The questions involved here, and the difficulties and embarrassments under which the State labors in this behalf, are, and will continue till this case is decided, to be of annual recurrence, involving, as they do, the taxation of the State to a considerable extent, the relations of the State with a large number—greatly more than half—of its tax officers, the annual repetition of a multiplicity of suits, and much uncertainty in the administration of the revenue laws of the State.

THOMAS N. McCLELLAN,
Attorney General, etc.

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## SUPREME COURT OF THE UNITED STATES.

WESTERN UNION TELEGRAPH COMPANY
vs.
STATE BOARD OF ASSESSORS, ALABAMA.

Now comes the plaintiff in error, the Western Union Telegraph Company, by Gaylord B. Clark, its attorney, and accepts service of the motion made by the Attorney General on behalf of the State of Alabama to advance the above cause for hearing, and consents that said motion may be submitted and heard on Monday, October the 25th, or on any subsequent day during the present term, and the said plaintiff in error consents for its part to the granting of said motion.

GAYLORD B. CLARK,
Attorney for Plaintiffs in Error.

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# In the Supreme Court of the United States.

October Term, 1889.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in error,
*vs.*
EDWARD A. O'NEAL, GOVERNOR OF ALABAMA, and others, defendants.
No. 115.

## BRIEF OF

## John T. Morgan, for Defendants.

# In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE WESTERN UNION TELEGRAPH COMPANY. Plaintiff in error,
*vs.*
EDWARD A. O'NEAL, GOVERNOR OF ALABAMA, and others, defendants.
No. 115.

## BRIEF FOR THE DEFENDANTS IN ERROR.

The revisory power of this court does not extend to the judgments of the State Supreme Courts, affirming the constitutionality of State statutes; unless those statutes are open to the question whether they are in conflict with the constitution of the United States. McBride *v.* Hoey., 11 Pet., 167. Bank *v.* Buckingham, 5 How., 317. State Railroad Tax Cases 92, U. S. Rep. 75.

No part of the judgment of the Supreme Court of Alabama in this case is open to question on this writ of error, except the part which holds that the tax laws of the State, as they were applied in the assessment of taxes upon the gross receipts of the Telegraph Company, were not an interferance with the paramount, or exclusive, right of Congress to regulate commerce between the States.

But, is the case in such an attitude in this court, that a judgment of reversal, on that ground, would sustain a mandate from this court, that the assessment of the tax on the gross receipts of the Telegraph Company made by the State Board of assessment, should be set aside and anulled?

The circuit court of Montgomery County dismissed the writ of *certiorari*, and quashed it; thereby holding that the writ would not lie against the governor, secretary of state, the auditor, the treasurer, and the attorney general of the state, who constituted the board of equalization and assessment for railroad and telegraph property.

One of the obvious reasons for quashing the writ was that this board had met and concluded its labors, as a board of assessment, and had exhausted its powers and became *functus officio*, before this writ of *certiorari* was issued, and that, also, the commissioners courts of each of the counties, in which the Telegraph Company did any business, had, before said writ was issued, passed upon the assessment made by the State board, approved it, placed it in the hands as the tax collector and issued warrants for its collection.

The collection of the tax had reached the stage where the tax collectors were the only persons whose conduct needed to be corrected, or could be, except that of the courts of county commissioners under whose immediate orders and warrants the collectors were then proceeding.

The board to equalize and assess these taxes, having ended its work, could not find any means, under the law, through which to correct, or control, the conduct of the commissioners of the counties or the tax collectors. That board had no power to interfere with them.

These questions were raised, and were well taken, in the motion of the attorney general, to quash the writ of *certiorari*, but, the Supreme Court of Alabama chose to affirm the judgment of the circuit court on other grounds.

That, however, does not free this court from the inquiry whether a mandate will issue to the Supreme Court of Alabama, directing that court to instruct the State circuit court to enter a judgment reversing the order of the board of equalization and assessment, when the commissioners court of each of the counties and the tax collectors, not being parties to the proceeding, may still be regularly engaged in collecting the taxes.

The writ of *certiorari* did not bring *the final order or judgment in the case before the Montgomery Circuit Court,* and the reversal, by that court, of the order of the board ot equalization, would not have reached the persons whose duty it was to *levy and collect* the taxes. An order issued by this court, through the Supreme Court of Alabama, to the circuit court at Montgomery, requiring that court to instruct the State Board of assessment to vacate the assessment of the taxes, would not affect the courts of county commissioners under whose orders the tax collectors are acting, and whose warrants they are executing.

The courts of county commissioners, respectively, accepted the assessment of taxes made by the State board, but, only as an assessment, and these courts had the jurisdiction to hear and determine the validity of all assessments.

It was to those tribunals, and not to the board of assessors, that the laws of Alabama referred all persons for a rectification of all tax assessments. There was no levy of taxes until those courts had examined the assessments, and approved them, and turned the lists over to the tax collectors for collection.

The question of jurisdiction to control the State board of assessors, whose functions had ceased, arose in the case and was made by the attorney general, on his motion to quash the *certiorari,* and it was decided in favor of the defendants in that case. It is still in the case, notwithstanding the Supreme Court of Alabama pretermitted its examination. This court cannot be asked to render a judgment against a party who cannot now be reached by its order, or judgment, and to deliver a moot opinion to control a body that no longer has any existence.

My connection with this case being only two days in advance of the hearing, and finding no briefs on file, I will here copy and adopt the argument of the Attorney General of Alabama, made in this case, on the hearing before the Supreme Court of that State. The attorney general, now one of the justices of that court, submitted the following argument.

"This was an application to the Circuit Court of Montgomery county by the Western Union Telegraph Company for a writ of *certiorari* to issue to the members of the State Board of Assessment, commanding them, as such Board, to certify the records of their proceedings for the year 1885, in the matter of the assessment made by the board against said company, to said Circuit Court, and praying that, upon the coming in of the return to the writ, the proceedings of the board in this behalf be quashed and avoided, and the assessment be set aside, or that the same be corrected, &c., &c.

A certified transcrip of the record of the Board in this particular was attached to and made a part of the petition for the writ.

The writ was issued on the 13th day of August, 1885, and executed by service on the 28th day of August, 1885.

On the hearing in the court below, the respondent moved to quash and dismiss the writ on the several grounds set out in the motion, which is a part of the transcrip. This motion was sustained and a final judgment rendered quashing the writ and dismissing the petition, and the case is here presented on appeal from that judgment.

The petition for *certiorari* alleges, as the particulars in which error was committed by the Board in the assessment of the property and subjects of taxation of the Telegraph company, the following:

1. That the valuation put upon its lines of wire and poles was not properly apportioned among the several counties of the State.

2. That the valuation put upon its lines of wire and poles was not justified by the evidence.

3. That in ascertaining the amount of its gross receipts the board embraced and assessed all the receipts of the company at offices in this State without regard to the question whether such receipts were from messages received from or sent to points beyond the State, or passing between points both of which are within the State.

4. That the assessment of gross receipts was void because the law imposing a tax of two per cent. on such receipts is violative of Section 1, Article XI, Constitution of Alabama.

5. That such two per cent. tax is invalid, because in excess of the rate limited in Sec. 4, Art. XI, Constitution of Alabama.

6. That such rate of taxation is invalid under Section 6, Article XI, Constitution of Alabama, in that it is a different rate than that imposed upon the property of individuals and other corporations.

7. That the law imposing such tax of two per cent. is unconstitutional, in that it is made to apply to telegraph *companies*, as is alleged, and not to *individuals* operating telegraph property, and is, therefore, class legislation.

8. That a tax on the gross receipts of a telegaaph company having a national charter and doing an interstate business is a regulation of commerce by the State, and therefore, violative of Clause 3, Section 8, Article 1, Constitution of the United States.

9. And of the 14th Amendment to the Constitution of the United States.

10. And finally, that such law is void because it is unjust and unequal in its imposition of the burdens of taxation.

## ARGUMENT.

Having thus, as briefly as was consistent with fairness and intelligibility, presented the facts, so to speak, of the case, and stated the questions of law which will spring from them for the adjudication of this court, I will now, in the argument, invite the courts attention to—

### I.

The nature and office of the writ of *certiorari* involved here—and with respect to this—I submit that this is purely a common law writ. It is true that there is a statute passed in 1879—Acts of 1878-9, p. 150—changing in two respects the common law in regard to writs of this class, and in two particulars only; *first*, by providing that answers of respondents are only *prima facie* true, and may be controverted, and *second*, that upon an appeal from the circuit to the Supreme Court, the judgment of the former on the evidence may be reviewed, being reserved by a bill of exceptions.

Acts 1878-9, p. 150, Secs. 2 and 4.

In all other respects the common law rules are *expressly* left in full force, and have been expressly decided by this court to be unaffected by the act.

69 Ala. 261, Leigh v. State, *Ex rel.*, &c.

And as neither of the points in relation to which this statute changes the common law is involved here, the case will be considered as strictly a common law proceeding.

## II.

The writ of *certiorari* is not a writ of right at common law. Its issuance *vel non* does not depend upon the existence or non-existence of technical errors in the proceedings sought to be reviewed, but rest in the sound discretion of the court, and it must be issued unless "it clearly appear that substantial injustice and injury has resulted or will inevitably result from the errors complained of."

49 Ala. 443, *ex parte* Stroback.
53 Ala. 50, *ex parte* Buckley.
12 Am. Dec. 529, Duggen v. McGruder.
1 Black, 414, Bainester v. Allen.
3 Dev. 528, Brown v. Stimpson.
17 Mass. 352, Lees v. Childs.
6 Cowan, 396, Moreral v Baker.

And hence, it follows that the writ in this case should not be sustained for the sole purpose of correcting the error—if error it be—which grew out of the apportioning of tax values to the several counties in proportion to the number of miles of lines in those respectively, instead of assessing the line in each county as of the value of that part of the line located in each, since the aggregate for the State is not thereby increased, and no injury results to the company.

And hence, also, the writ cannot be sustained on the ground that the valuation put on the lines of the poles and wire was above what would have been an average of the values given in evidence, though yet not up to the maximum figures given by the witnesses. The company, speaking by its officer as a witness, failed to show what proportion of its lines were of the minimum and what of the maximum value, and in assessing at a valuation nearer the latter than the former limit of value given in evidence, there is nothing to make it "clearly appear that substantial injustice has been done."

Neither of these points, however, for reasons to be given further on, can be looked to to sustain the writ.

## III.

The writ of *certiorari* in this case is in the nature of a writ of error, and its office is to review questions of law and not conclusions of fact. It goes to the *jurisdiction* of the Board of Assessment in the premises, and the *legal regularity* of the exercise of that jurisdiction, but the *evidence* upon which the Board acted, and the conclusions which were reached on that evidence cannot be reviewed on this, a purely common law *certiorari*.

65 Ala. 239, Camden v. Block.
63 Ala. 153, Dean v. State.
75 Ala. 492, McAllilly v. Horton.
12 Am. Dec. 532, Duggen v. McGruder, (and authorities cited in note.)
69 N. Y. 411, People v. Police Board.

The Act of 1879, before referred to, does not affect the common rule in this particular. The provision in that act for the review of conclusion of fact is limited to the evidence which is introduced—not in the inferior tribunal—but in the circuit court; such, for instance as the agreed statement of facts for the purposes of the motion in this case. Legislative action was necessary to enable this court to pass on that evidence even. This legislative action is expressly limited to evidence in the court from which the appeal is taken. The statute so far from militating against my position gives positive strength to it, in that it establishes a construction by the General Assembly that without the passage of a statute authorizing it to be done, evidence could in *no* case be reviewed on *certiorari*. This strictness of construction, if, indeed, there is room for any construction, is fully supported in Leigh's case.

69 Ala. 261, Leigh v. State, *ex rel*, *&c.*

Nor is the rule in this regard changed by the fact, that the evidence adduced before the inferior tribunal —the Board of Assessment—is actually brought into this court by being excepted to and incorporated in the record. Notwithstanding this, the evidence will not be considered.

22 Ill. 106, R. R. Co. v. Whipple.
13 Pa. St. 389, Overseers v. Brown.
65 Ala. 239, Camden v. Block.

It is upon this thoroughly well established principle that the valuation assessed on appellants' lines of poles and wire cannot be considered at all in this proceeding, and the same is true with reference to the apportionment to the counties.

## IV.

The common law writ of *certiorari* is not an elastic process. The power of the superior over the action of the inferior tribunal is not plenary but limited. The proceedings reviewed must be either *affirmed* or *quashed,* either sustained *in toto* or avoided *in toto.* The judgment or conclusion reached below cannot be reversed and remanded for further action below in the premises, or reversed and rendered here, "meting out sudstantial justice and equity," nor can the action reviewed be affirmed in part and quashed in part. The whole proceeding must stand or it must fall.

65 Ala. 239, Camden v. Block.
75 Ala. 492, McAllilly v. Horton.
2 Desty on Taxation; 239.
50 Mich. 50, Whitbeck v. Hendersonville.

Nor is there anything in the argument of appellant's counsel that the statute of 1879, above cited, obviates the common law rule in this particular. The "relief" there referred to is such and such only as the applicant is entitled to under a common law writ. That relief is only to be granted by quashing the proceedings if they contain error which will work substancial injustice. The case *supra,* of Camden v. Block and McAllilly v. Horton, were decided after the passage of the act of 1879, and the case *supra* of the City Council of Montgomery *in re* Knox, expressly interprets this act not to enlarge the common law functions of the extraordinary remedies it relates to.

69 Ala. 271 *Ex parte* City of Montgomery *in re* Knox.

This limitation on the action of the reviewing court has, I conceive, an important bearing on one ground relied on by appellant for the relief prayed. The grievance referred to grows out of the action of the Board in assessing as "gross receipts" all the receipts of the appellant at its offices in this State, whether from messages passing between points within the State or between points within and points without the State. If the appellant is right as to the construction of the statute which is insisted on, that is, that only business done between points, both of which are in Alabama, can be taxed, (which construction I will endeavor further on to show is entirely erroneous), then there was error in the assessment made by the Board. But for this error should the whole assessment be quashed? Would "substantial justice and equity" be subserved by quashing an assessment the greater part of which is correct, on the ground that to an inconsiderable extent it is excessive? Would it not be a greater injustice to the State to quash than to the appellant to affirm such assessment? Would it not be a wise and sound exercise of that judicial discretion which is permitted to be indulged on this writ to let the assessment stand in this proceeding because a contrary course would result in greater wrong to the other party, and leave the appellant to another remedy in another forum where exact justice could be administered and that part of the assessment which is correct allowed to stand and the excess abated? There is such a remedy and such a forum open to the appellant (as I will show further on,) by application to the several commissioner's courts of the State. And it is submitted as to this point, that even granting the construction contended for by appellant to be the correct reading of the statute, that justice and equity were subserved in the court below by the denial of the writ, and that the judgment of the circuit court should not be disturbed on this ground.

## V.

The judgment of the circuit court must be affirmed upon another ground, entirely distinct from those discussed above and from the merits of the case. Before the petition for *certeorari* was filed, the Board of Assessment had completed its duties and adjourned without day, and the assessments made against the appellant had been certified by the Auditor to the county assessors, and before the writ was issued and served these assessments had been entered upon the county assessment books, submitted to the commissioners' courts, passed upon the courts, and certified into the hands of the tax collectors as warrants for collection. These are the agreed facts. And upon these, I insist that all control of the Board over these assessments had ceased, that the Board itself was *functus officio*, incompetent to take further official action, even to convene or adjourn, and the further action by it cannot be compelled by the courts. The Board is of purely statutory existence. It depends upon the terms of the statute for its power to convene for its power to act when convened and for its power to convene from day to day. There is a day fixed for the convention of the board and *when there is a failure to meet on such day, and in no other case*, there is a provision for meeting at a subsequent time to be fixed by the Governor. But this power of the Governor is contingent upon a failure to meet at the day fixed by the act. It follows, necessarily, that when there has been a final adjournment there is no power inherent in the Board, or existing in any officer to re-convene the Board for any purpose. Its duties are discharged; its functions are at an end. In May of the following year, it meets again, but only for the purpose of assessing property for the taxation of the current year. The conclusion, therefore, is irresistable, that *certiorari* will not lie under the facts of this case to correct the assessment however erroneous, since no action by way of correction or otherwise, can ever be had by the Board with reference to the assessments made by it for the year 1885.

Nor can those assessments be entirely quashed and abated even though that course, were it otherwise admissable, would not involve further action by the Board, and for this reason: the *certiorari* brings up only the record of the Board. These assessments have passed beyond its controll into the hands of other officers by whom the *rates* of taxation have been made a part of them, through the commissioners' courts, by which the county levies have been added to them, and finally, corrected and certified, have gone into the hands of the collectors in the shape and having the effect of warrants. From being a mere ascertainment of values which is shown by the records of the Board, they have become, by the operation of law and the action of other jurisdictions, executions in the hands of utter strangers to this proceeding, whose rights, and duties, and liabilities with reference thereto are fixed by law, and so vested that they cannot be deprived or relived of them without a day in court—an opportunity to be heard. In other words, a revision of the record of the State Board of Assessment cannot affect an assessment in the hands of strangers to that record and to the proceedings, and the revision therefore cannot be had.

The authorities in support of these propositions are abundant and conclusive.

It has been repeatedly decided under statutes which provided for boards of assessors with powers identical with those of our State Board of Assessment, ***except*** that those boards had the additional power here lodged with our commissioners' courts, of hearing complaints and correcting assessments, that when the board has completed its duties, and the assessment has passed into the hands ot other officers, as directed by law, *certiorari* will not lie to the board of assessors.

48 Barbour, 176, People v. Freebrick.

49 N. Y., 655, People v. Delaney.

43 Barb. 543, People v. Reddy.
1 Hill, 198. People v. Queens county Superv's.
9 Hun. (N. Y.), 611, People v. Tax Com.
15 Wend. 211, People v. Alleghaney.
2 R. S. (N. Y.), 992; 993; 995; 996.

And in New Jersey it is held that the writ should be directed to the officer in whose hands a duplicate roll has been placed for collection.

32 N. J. Law, 365.

And in New York it is held that where the assessment has culminated in a warrant for collection, there is no redress by *certiorari or otherwise.*

31 N. Y., 81, People v. Assessors, &c.
53 N. Y., 49, Nat. Bank v. Elmira.

(But this rule is obviated in this State by the statute which provides for the correction of error in assessments *at any time by the commissioners courts.* Acts 1884-5, p. 38, Sec. 41.)

And a like conclusion was reached in Illinois.
27 Ill. 50, Ohio R. R. Co. v. Lawrence.

And the collection of the tax is not staid by *certiorari* unless issued before the assessment passes out of the control of the board.

1 Desty, 639.
49 N. Y., 655, People v. Delaney.

The reasoning upon which these several decisions are predicated applies with peculiar force to the question here involved under the provisions of our statutes with reference to the duties and liabilities of tax collectors. For instance, the collector has the amount of this assessment as completed by adding the county levy and stating the amount of tax due on the rates fixed by law, charged up to him, to the amount due the State, on the books of the Auditor's office, and to the amount due the counties, on the books of the county treasurer. There are but two ways in which he can liquidate these charges; one is by payment, the other is by having the commissioner's court allow him credits on proper showing to be determined by the court. Are his duties and liabilities, thus accrued, and directed by statute, thus to be settled in the commissioner's court, to be passed upon and determined, without statutory warrant, and in a proceeding to which he is not a party, and of which he has no notice? The effect of quashing the action of the State Board, if it have any effect, would be to quash a writ issued by another board, in the hands of an officer having no connection with or relation to the Respondents; and to annul the action of another tribunal whose proceedings are not before this court. To quote the language of the New York court in a case involving this very question: "*It cannot for one moment be contended that this court can quash proceedings not brought up by the writ.*"

15 Wend. 211, People v. Alleghaney.

To this position it is objected that the appellant is left without a remedy against an illegal tax, and that unless *certiorari* to the State Board of Assessment would lie, the company would be forced to pay a void assessment. This objection is unsound. There are several remedies. The collection of an illegal tax may be enjoined at any time before payment. After payment, under duress, it may be recovered back from the collector.

There is yet another remedy—plain, adequate, complete—open to appellant, if this assessment is illegal. This remedy is by application to the several commissioners' courts to have the assessments corrected, or quashed, as the facts and law may require. I entertain no doubt of the feasibility of this remedy under the act of 1884-5, whatever may have been the construction of former statutes in this regard. The only difference that can be predicated on the statute between this and all other assessments is that there is devolved upon the State Board with reference to telegraph property, a part, and only a part of the duties of the county assessors as to other property, and the Board *pro tanto* only takes the place of the county assessor. The duties of the Board extend only to the ascertainment of value. When this is done the Auditor—not by reason of his membership of the Board, but in his capacity as an executive State officer—notifies the county assessors of the values so ascertained. The assessors then attach the rate provided by law, bring down the amount of tax and otherwise complete the assessment. These assessments are then, like all others, put on the book of assessments, and submitted by the assessors, through the probate judges, to the courts of county commissioners.

Acts of 1884-5, Rev. Act. sections 14, 15, 27, 35, 40.

It is clearly within the contemplation of the act of 1884-5, that opportunity should be afforded all tax-payers to have assessments corrected. This opportunity cannot be given before the State Board of Assessment. That body is now only the assessor of valuation; it is not, as formerly, a board of equalization.

Acts 1868, 297, *et seq*.

Acts 1884-5, Sections 13, *et seq*. (Rev. Code).

And unless this opportunity is afforded the law is unconstitutional.

8 Sawyer, 238, San Mateo Co. v. So. Pa. R. R. Co.

It was held under the act of 1868 that assessments by the State Board were not subject to correction by commissioner's courts.

58 Ala. 558, Perry Co., v. R. R. Co.

But it is submitted with reference to that decision; *first*, that this point was not involved in the case, and what is there said is a mere *dictum; second*, that the conclusion there announced, whether *dictum* or not, was incorrect and should be overruled, and *third*, whatever may have been the sound construction of the statute of 1868 in this particular, the statute of 1884-5 demands a different interpretation. There are several points of difference between the two acts in this regard. One is that under the former act the State Board, as shown above, was a board of equalization. Returns of railroad property were required to be made to the auditor, as returns of individual property were required to be made to the county assessors; and, upon these returns of railroad property—which performed the same office as the lists given to assessors of individual property—the State Board acted by way of correction and equalization; thus performing the same duty devolved on the commissioners' courts with respect to the assessments made by county officers. In the act of 1884 5, this manner of proceeding is done away with, and the State Board, instead of performing the functions of the commissioners' courts, discharge those only of the assessors. It now has no power of correction and equalization, and unless these powers reside in the commissioners' courts they do not exist. The language of the act clearly embraces this power in the commissioners' courts and the delegation of powers to these courts, in this regard, is expressly required to be liberally construed.

Acts 1884-5, Sec. 44, (Revenue Code.)

This view is strengthened by the requirements of Section 14 of the act referred to, that the valuations ascertained by the Board shall be certified to the tax-payers. This is required to be done after the adjournment of the Board, and hence, cannot be for the purpose of giving opportunity to appear before it to ask for corrections.

Neither can it be for the purpose of informing the tax-payers of the amount of tax they will have to pay, because these assessments only show the valuation of property, not the tax due on it, to the State, and shows nothing, whatever, in regard to the county levies. *The only field for the operation of this provision is by way of affording the tax-payer an opportunity of contesting the correctness of the valuation of his property before the commissioners' courts.* This, too, is a radical change from the act of 1868. That statute contained no provision of this character.

Acts 1884-5, Sec. 14, (Revenue Code).

And it is, therefore, submitted, the judgment of the Circuit Court, sustaining the motion, must be affirmed, on the ground, alone, that appellant's remedy is not by *certiorari,* but by injunction, or by action of assumpsit, or by application to the commissioners' courts to have assessments corrected.

Having thus discussed what may, in a sense, be considered the technical infirmities of the writ, I come now to the merits of the case, strictly speaking, involving, as before indicated, the construction of the provision of the act of 1884–5, as to gross receipts, and whether that provision is obnoxious to the State or Federal constitution. And it is submittted—

## VI.

That the language of the act in this particular sustains the action of the Board in assessing all the receipts of the appellant at its offices in this State, both from messages passing between points within the State and from messages passing between points, one of which is without the State.

The language used is, "On the gross receipts derived from business done by it in this State."

Rev. Act 1884-5, Sec. 6, Clause 6.

"The word 'business' embraces everything about which a person can be employed."

23 N. Y. 244, Parker Mills v. Com. Texas.

"The term 'business' signifies that which occupies the time, attention and labor of men for the purpose of a livelihood or profit."

16 Ala. 413, Moon v. State.

Now, when the appellant, by its agents, at its offices in this State, is devoting its time, and attention, and labor to receiving from its patrons telegraphic messages, and sending them to points beyond the State and receiving here compensation therefore; and to receive messages from offices beyond the State to persons here, delivering them here and receiving therefore compensation here, it is not doing business in the State? And, is not this receiving and sending, and being paid for, messages here; and receiving and delivering here, and being paid for messages, a matter about which the appellant is employed at its offices in this State wherever such messages go to or come from? The true meaning of the provision, I apprehend is, that the company shall pay on its *receipts at offices in this State,* that when a message is sent from one of its offices in this State and paid for here, or received at and delivered from one of its offices in this State and paid for here, these payments go to make up its "gross receipts," which are to be taxed. And this is the only reasonable construction of which the provision is susceptible. Nor will any hardship result to the appellant from this construction. The receipts at points out of the State from messages sent to or from points in the State, or which have passed through the State, are thus left free of taxation or to be taxed in States where the payments are made. And the provision, so interpreted, as nearly as practicable, while evidently not its primary purpose, taxes messages which actually pass over the line in this State. The position of appellant on this point is wholly untenable and impracticable. It is that, although messages may be paid for here, and although they may pass over a line running four hundred miles in the State and one mile beyond the State's limits, yet this is not business done in the State, and not only so, but that no part of the service rendered in connection with such a message is a transaction within the State. The construction of the appellant is inconsistent with itself. It is that the business of the company in this State is the flight of messages over its wires, and not the work done by its operators, electricians, bookkeepers and messengers at its various offices here, and yet it is insisted that the transmission of messages over wires in the State is not business done in the State unless the passage begins, continues and ends in Alabama. The statement of the position shows its unsoundness. It would, indeed, be a strained and unnatural construction to say that the agent of the company in Mobile, for instance, who received for a man in Mobile, a message from Chattanooga, entered it on the books of the company at Mobile, made a copy of it to be preserved in the Mobile office, delivered the message to the man in Mobile, received in Mobile payment therefore, charged the same in the Mobile office against that office, and accounted for the same as a transaction of that office, was not doing business in the city and county of Mobile for the company, and that the sum so paid in was not received from business done in this State? Or, to say that the operation of an office in Eufaula, for instance, the wires from which extended only to points in Georgia, was not the doing of business in this State, and the amount paid in there was not the receipts from such business?

If the construction of appellant is well grounded, inextricable confusion will result in the apportionment of gross receipts to the counties. Instead of apportioning to the counties the sums received at offices in them respectively, the auditor would have to ascertain what proportion of the charge for such message was for its passage through each county, and certify that to assessors. This would be simply an absurd attempt to perform an impossibility.

It would seem that no resort to construction is necessary to sustain my position on this point, but, if construction be required, it should be a liberal one.

Provisions of tax laws pointing out the subjects of taxation are not to be strictly construed.

Cooley on Taxation, 205.

38 Conn. 447, Cornwall v. Todd.

## VII.

It is insisted by appellant that the law imposing a tax of two *per centum* on its gross receipts is unconstitutional, and before considering that question I will suggest that it does not appear to be raised in this record. It was no part of the Board's duty to fix a rate of taxation on the values assessed by it, and this was not done, as the record shows. The statute directing the ascertainment of these values by the Board makes no reference to the rate to be put on them by other officers. It does not appear that any rate has ever been set against these assessments, and the presumption is that if any, a constitutional rate has been fixed by the officers whose duty it is to perfect the assessments.

Another view of this aspect of the case is this: If the rate of two per cent. is unconstitutional it is solely upon the ground that "gross receipts" is "property," within the meaning of Art. XI of the Constitution of Alabama, and if that be true such receipts are taxable as property, under *Subdivision* 13, *Section* 5, of Revenue Act of 1884–5; and the assessment would be legal as a basis for the imposition of the "property" rate thereon.

But the case of the appellees need not be rested upon either of the propositions last above stated. It may be admitted for the sake of argument that the constitutionality of the two per cent. tax is squarely raised in this record, and that question will now be considered.

## VIII.

It is admitted in the outset that if this were a tax on "property," in the constitutional sense it would be violative of sections four and six, and possibly of section one of Article XI, Constitution of 1875. And it is equally clear that if "gross receipts' is not "property" within the mean- of these sections, the imposition of this tax is not an unconstitutional exercise of legislative power. No proposition is now better established in the law, than that State Constitutions are not in the nature of enabling acts but are limitations upon the powers of legislatures. Or, in other words, that the General Assembly is not to look to the constitution to ascertain what is permitted it to do but only to find what inhibitions that instrument has put upon its action. The legislature may pass any law which does not *conflict* with constitutional provisions. In the absence of the restrictions contained in Article XI, Constitution of Alabama, there is absolutely no State limitation on the power of the legislation in the imposition of taxes. Laws levying any rate on property and subjects of taxation, or imposing a different rate on different species of property, or levying taxes without reference to valuation, or taxing one class of property and excepting another, could be constitutionally enacted. Two classifications of the bases of revenue have always been recognized in the laws of the State. These are *property*, and *subjects* of taxation. And these designations of taxables had become well defined and established terms long before the Constitution of 1875, not only by their repeated use in statutes prior to that time, but by the adjudications of this court as well. The convention of 1875, when it came to deal with the subject of taxation found these two classifications existing and recognized. It was the sense of that body that legislative power as to the taxation of one of these species of taxables should be restricted. It was not thought wise to limit the power as to the other, and the result we have in Art. XI, of the Constitution, in those several limitations on the taxation of "*property,*" and no provision whatever with reference to the taxation of "*subjects*" of taxation. And it is submitted that in the absence of restrictions as to *subjects* of taxation, the law making power as to them is left to the fullest and freest exercise of a discretion, responsible alone to the people.

64 Ala. 463-466, *Ex parte* Montgomery, etc.
53 Ala. 576, Mobile v. Stonewall Ins. Co.
54 Ala. 499, Ins. Co. v. Lott.

And this power of taxation, inherent in all government, and without limitations other than those expressed in the organic law, is never to be taken to be surrendered by intendment or implication. Without some expressed surrender, clear and explicit in terms, this power must be held to reside undiminished in the legislature

48 Am. Dec. 531. Baltimore v. R. R. Co.
44 Am. Dec. 438--note 441.
43 Mo. 479 -489, Glascow v. Rouse.

The question then recures, What is "property' in the sense of Art. XI? The terms of that article on this subject, themselves, assist somewhat in answering this question. Section 1, for instance, provides that property shall be taxed in exact proportion to its value. This provision cannot refer to occupations, to callings, to business, because these are not property in any sense, and certainly not in the sense of this section, since, in the nature of things, they are incapable of valuation. This section itself, then, furnishes so much of a constitutional definition of "property" as shows that it means something tangible and existing, capable of a determinate value. A business is not such a thing. A tax may unquestionably be levied on a business, graduated by gross receipts, which has no value whatever. And a business which returns a net gain of $1,000, could, undoubtedly, be taxed in the same amount, if gross receipts are equal, as a business that afforded a net gain of $10,000. It is not even contended that gross receipts cannot be taxed, but that if taxed the rate must be in proportion to the value of the business out of which they issue. This is imposible, as gross receipts bear no necessary relation to the value of business. This section, then, can have no reference to taxes on business.

Section 4, of Art. XI, contains also this idea of valuation. The limitation of that section is on the rate to be levied on the *value of property.* There must be an assessment of the value of a thing, and this requirement is predicated on the hypothesis that the thing has a definitive value. Business has no such value. Take, for instance, the appellant's property. It is feasible to determine the value of its lines of poles and wires, its instruments, and its offices and the furniture in them. But to say on the first of January, in any year what will be the value of its business for that year, is an impossibility Its gross receipts for the year past may be ascertained, but these receipts can be no measure of the value of its property or its business.

This same idea of valuation runs through Section 6 of Article XI, and these provisions all go to show that the word "property" in them is used in its restricted sense a tangible, corporeal substance, *in esse*, and covered by the terms "lands and chattels."

38 Ala. 138, Lott v. Ross & Co.

A tax on "property" attaches as of a day certain. This tax on gross receipts attaches whether the taxpayer has at that time one cent of that which issued out of his business during the previous year. It may be that all the gross receipts of the year and more have been absorbed in paying the expenses of the business, and this as rapidly as they accrued. But the tax none the less fastens upon them as a measure of the extent of the business done. It is a tax not on what the tax-payer has at the time but on what he has received. Not on what he possesses but on what he has done in a certain period. Not on his "property," but on his business—a "subject" of taxation. And its imposition is not limited or affected by constitutional provisions relating to "property." This position is fully sustained by authority.

In Alabama the distinction between "property", and "subjects" of taxation was recognized by Justice Stone in the case of *The State v. Lee & Norton.*

38 Ala. 223, State v. Lee & Norton.

And the term "property," in a law delegating the taxing power, was held not to include "gross receipts" from the sale of merchandise, and that a tax on such receipts was not a tax on property, but on the business—a "subject" of taxation.

38 Ala. 156, Lott v. Ross & Co.

Judge R. W. Walker, in the course of an elaborate and learned opinion in the case last cited, uses this language:

*"The appellant must show either that this tax on the sales of merchandise is a tax on property, or that the word "pro-*

*perty" as employed in the act, is not to be understood in its usual sense, as designating what one is the owner or possessor of, but should be construed as synonymous with the more comprehensive word "subjects." That the first of these propositions,"* (that gross receipts is property), "*cannot be maintained, we consider too plain for argument. A tax upon the gross receipts from sales of merchandise * * * is not a tax upon the goods themselves, or the fruits of the sale, but upon the business or act of selling. This is not then a property or income tax, but an occupation or privilege tax.*"

38 Ala. 159, Lott v. Ross & Co.
4 Texas, 139, State v. Stephens.
4 Fla. 402, Mosely v. Tift.

This classifications of taxables has existed certainly since 1868 in our laws, and is carefully preserved in the act of 1884-5.

Acts 1884-5, pp. 1, *et seq.*
Acts 1868, pp. 297, *et seq.*
Code, section 339.

In Alabama there is a legislative construction of long standing, and of well maintained opinion of the Supreme Court, that gross receipts from business is not property in the sense of the several provisions of Article XI of the Constitntion referred to, and there is nothing in any of the cases relied upon by Appellant, from this Court, that in the slightest degree militates against the proposition.

A brief review of these several cases may be desirable.

One of them, *The State v. Board of Rev. and Com'rs of Mobile*, was asserted by Appelant's counsel below to be "a direct, positive authority" against the constitutionality of this tax, and seems to be greatly relied upon here by the Appellant. This question was not involved in that case. Its decision was not necessary to the determination of that case. What is there said by the Judge rendering the opinion is not, therefore, authority here.

The Court there held that the gross income of railroads could not be taxed, not because to tax them would be unconstitutional, but because the statute had omitted to provide the machinery for the collection of such a tax. And the opinion goes on to speak of the constitutionality of such a law, *had it been enacted*. Clearly this is *dictum*, pure and simple, instead of being "a direct and positive authority." But it is not proposed to rest the argument against the effect sought to be given this case on the ground that it was as to this point, a mere *dictum*. It may be admitted, indeed, it is admitted, that the position there laid down, whether *obiter dictum* or not, is a sound exposition of the law. The cases, as brought to the touch of the principals bearing on this question, are wholly unlike. The statute there construed provided for the taxation of the gross receipts of railroads, *after deducting their expenses*. In other words, it was not a tax on gross receipts at all, but upon net receipts, net gains, increase, not on the *business* done by them during the year—not upon business at all—but on money in the hands of the company at the end of the year, which is of course as much "property" as their rolling stock or station houses. Under that statute nothing but this money, actually gained, held and owned on the first day of January, could, by any possibility, be taxed. It could not be a tax on business, in that, however great the gross receipts of a business were, if those receipts were all expended in the conduct of the business, no tax could be imposed. The act operated wholly upon *property* and, therefore, it had to conform to the limitations contained in the Constitution.

73 Ala. 66-70, State v. Board of Rev.

Nor does the case cited to this point by Justice Stone sustain the position of Appellant. The tax there involved was upon capital stock employed in a business, not on the business—on the *property* owned by the company donig the business, and not on the gross receipts from that business.

53 Ala. 570, Mayor v. Stonewall Ins. Co.

In the case of the *Board of Revenue v. Gas Light Co.*, a proposition similar to that in Mobile case above referred to, was announced by the court. The provisions of the statute construed were substantially the same in both cases. The tax imposed was upon the net result, in money of a years business, not on the business itself, but property that had issued out of the successful operation of the business, and was held and owned by the company, as any other property, on a day certain. It may be well to observe here, too, that there was no chance under this law of taxing the company on anything not actually in possession on the day the tax attached. The deduction of the expenses of its business necessarily implies the deduction of *all* the expenses of a corporation, since it can incur no expense except in the prosecution of its business. Unlike individuals, it has no expense of *living*.

The case of *Lehman, Durr & Co. v. Robinson*, 59 Ala., 249, is relied on to show that the word "property" is sometimes construed to embrace "subjects" of taxation. This is true, and it is also true, as was held in a case in 9th Alabama, that the phrase "taxable property," is some times construed to embaace a poll tax. But these constructions were both properly put upon the ground that the context of the statute showed that this was the intention of the legislature, and the reason of the law required them. The context of the act of 1884–5, and of the Const. of 1875, leads to the exactly opposite conclusson, and for the very reason given in the *Lehman-Robinson* case, this Court will have to maintain the distinction between "subjects" and "property."

These, it is believed, are the only adjudications in Alabama having any bearing on this question.

In other States there are numerous authorities, and, without exception, so far as exhaustive examination has disclosed, they sustain the position of the Appellees.

The distinction insisted on above, between a tax on gross receipts, deducting expenses, as in the two cases *supra*, and upon gross receipts without more, as in this case, to the effect that the former is a tax on property and within constitutional restrictions, and that the latter is a tax on business and not affected by organic limitations, has received the sanction of more than one court of last resort. Among others, the Georgia court, in an able opinion, upholds it. The question involved was identical with the one here being considered: Whether a tax on gross income was a tax on property within the meaning of the constitution of that State limiting the taxation of property?

The Court say:

"But are gross earnings and interest coming in from any source—labor, capital, investment of any sort, money loaned—are these things property in the sense of the constitution, and to be taxed as real, genuine property, such as real estate and personal effects, or are these really income? Certainly the gross earning of a laboring man are nothing but his income. So it would seem the earnings of a salaried officer are income; and so the income from capital employed in a bank, or railroad, or manufactory, would seem to be income only. *The net income after expenses are paid become property when invested, or if it be money lying in bank or locked up at home. But to call it property when it is all consumed as fast as it arises, going*

*on the back, or in the stomach, or in carriages and horses, (which are taxed), or in travel or frolic, to call such income, so used, property would seem to be a perversion of terms."*
60 Ga. 99, Warring v. Savannah.

In Missouri a tax on income, the word being used in its broader sense, to designate gross receipts, not net gains, was held valid, on the ground that such income was not "property" in the sense of the constitutional limitations, in that State on the legislative power to tax "property."
43 Mo. 479, Glasgow v. Rouse.

This word "income" in all the Alabama cases, *supra*, is used in the more limited sense of net gains, and in that sense it was properly employed by Justice Walker in *Lott v. Ross & Co.*, 38 Ala. 159, as a synonym of "property."

There are numerous cases, which, while not adverting to the distinction above insisted on between net and gross receipts, hold broadly that the latter is not "property" in the meaning of constitutional restrictions on the taxing power. In California, for instance, a constitutional provision requires that "all property shall be taxed uniformly and in proportion to its value," was held inapplicable to a tax on gross receipts from the sale of goods, and broadly, that these provisions had reference only to real estate and chattles—property in the usual sense of the word. (This California case, and the case of *Glasgow v. Rouse, supra*, 43 Mo., will be found to be quite an elaborate and able discussion of this whole question).
4 Cal. 46, People v. Coleman.
60 Am. Dec. 581, People v. Coleman.
*Citing* 1 Texas, 653, Aulanier v. Gardnor.
3 Scan. 127, Sawyer v. City of Alton.
12 Mass. 252, Bank v. Afthorp.
16 Cal. 119; Sacramento v. Croker.

And; more or less directly, to the same point, are the following authorities;

42 Ga. 596, Burch v. Savannah.
50 Ga. 530, Ins. Co. v. Augusta.
49 Ga. 195, Bohler v. Schneider.
21 Iowa, 221, Homestead Co. v. County.
10 La. Am. 50, City v. Dubois.
11 La. Am. 68, New Orleans v. Staiger.
13 La. Am. 50, New Orleans v. Lurpin.
17 Mich. 68, Walcott v. People.
20 Mich. 325, Hitson v. Anne Harbour.
11 Ohio (N. S.), 534, Baker v. Cincinnati.
13 Gatt. 757, Slaughter v. Comm.
2 Head, 363. Adams v. Somerville.
2 Head, 460, State v. Crawford.

The constitution of Louisiana contains a provision limiting the rate of taxation of property to 12½ mills. A law was enacted imposing a rate in excess of this limitation on the gross amount of sales at auction, to be paid by the owner of the property sold. This imposition was held not violative of the constitution, because it was a tax on the business or act of selling, and not a tax on property.

31 La. Am. 382, Wintz v. Girardy.

While this case, in its facts, goes more directly to Section 4, of Article XI, than others cited, it is not more of authority as to that particular provision than those others, because they all turn upon the question of property, *vel non*, and if the subject—basis of this tax of two per cent. is property, it violates Section 1 and 6, as well as Section 4, of Article XI. and if it be not property, none of them are violated.

It follows, then, so far as the constitution of Alabama is concerned, that the General Assembly, not being restrained by any of these provisions, as to the taxation of "subjects" of taxation; may levy a tax on them without regard to the rule of valuation prescribed in Section 1, Article XI, (especially since valuation is impossible), with respect to property, and in excess of the rate on property limited in Sec. 4, Art. XI, and in disregard of the equality of rate on the property of corporations and individuals, required in Section 6, Art. XI.

## IX.

It is insisted by appellant that this imposition of two per cent. in violative of the 14th Amendment to the Federal Constitution, in that (1.) it is exacted from telegraph companies and not from individuals operating telegraph property; and (2.) that a different rate is put upon the gross receipts from the business of telegraphing than that put on other business, or that this business is taxed and other businesses are not taxed

The answer to the first position is that the premise is fallicious. The law does not operate alone on companies or corporations, but on the business of telegraphy, by whomsoever engaged in. It is true that the clause of the act laying the tax employs only the word "company," but clause 5, of section 1, of the act, in giving definitions of the terms used in the act, provides that the word "person," or "other word importing the singular number shall be held to include firms, companies, associations, and corporations," and on the other hand, "all words in the plural number," that is firms, company, association and corporation, "shall apply to single individuals in all cases in which the spirit and intent of this chapter require it." There is. to mind, no need of construction to hold that the spirit and intent of the act requires the word "company to include individuals. "Company" is, in fact, the most apt example of a word importing the plural number. If construction be necessary, the proper one is furnished the Court by two cases greatly relied on by Appellant, cited below, in which the word "person," even unaided by such a definition of terms as we have here, was held to mean a corporation. And the reason given by this Court, in one of these cases—that any other construction would render the act unconstitutional, and it was the duty of the court to adopt any interpretation that the language employed would admit of, to avoid such a result—applies with equal force here.

64 Ala. 269, Board of Rev. v. Gas Light Co.
8 Sawyer, 238, San Mateo Co. v. So. Pa. R. R. Co.

It does not of course appear of this record, but it is a fact, to which reference may, not improperly, here be made, as it is shown by the public records of the State, and will therefore come, perhaps, within the judicial knowledge of the court, that the act in this regard has, in practice and without objection, been construed to embrace the business of an individual operating telegraph property. There is one, perhaps two, lines in the State owned by an individual, and his gross receipts are taxed just as those of the Appellant company

The second position of the appellant, namely: that the rule against class legislation would require that all businesses be taxed, and taxed at the same rate, if any are taxed, is clearly untenable. It has been long established that, under constitutions requiring uniformity and equality of taxation, the legislature may classify the persons and subjects of taxation, and lay different rates on different classes. The requirement is fully complied with when the burden is imposed equally *on all of the class*, tho' it may rest more heavily upon one class than another. Another restriction is probably deducible from the authorities; that is, that the classification must be based upon the subject matter taxed, or the circumstances which surround it, so to speak, and not an arbitrary selection of the persons to bear the duty. For instance, it is entirely competent for the legislature to tax the business of merchandizing at one rate, and the business of practicing law at another rate, and to exempt the business of planting altogether, but a law taxing red headed merchants, or bald headed lawyers, or exempting farmers of a certain avoidupois, would be invalid. The classifications, in other words, must include all persons natural and artificial, similarly circumstanced, with reference to the business taxed.

This, law, we have seen, embraces all persons engaged in the business of telegraphing, and it is wholly immaterial that other business, embraced in other classfications, are taxed at different rates or not at all. Mr. Justice Field, in the *San Mateo* case cited, in *Smith v. L. & N. R. R.*, 75 Ala. 449, both of which cases are greatly relied on by Appellant, lays down the proposition I contend for, that the "equal protection of the laws," guaranteed by the Fourteenth Amendment, means that one person shall not be subjected to greater burdens and charges than are imposed on all others "under like circumstances." The classifying circumstances here is the engaging in a certain business. All who engage in it are equally charged by, and receive the equal protection of the law.

62 Pa. St. 494, Durach's Appeal.
6 S. C. 1, State v. Columbia.
8 Sawyer, 238, San Mateo Co. v. So. Pa R. R. Co.

Section 6, of Art. XI, Constitution of Alabama, even if it applied to the taxation of business would not invalidate this tax. There is no discrimination or difference of rate between the business of telegraphy conducted by a corporation and the business conducted by an individual. But for reasons given *supra*, that section has no application here.

## X.

There is but one other question in the case: Whether the laying of this tax on the gross receipts of a telegraph company, having a national charter and doing an interstate business, is violative of the Federal constitution as a regulation of commerce? This point has been more than once decided adversely to the contention of the Appellant, and it is deemed unnecessary to do more in this connection than to refer to the adjudged cases, in several of which Appellant was a party.

55 Texas, 314, W. U. Tel. Co. v. Texas.
28 Ohio St. 521, W. U. Tel. Co. v. Mayor.
26 Gratt. 1, W. U. Tel. Co. v. Richmond.
105 U. S. 460, W. U. Tel. Co. v. Texas.
73 Me. 518, State v· W. U. Tel. Co.
15 Wall 479, Osborne v. Mobile.
44 Ala. 493 Osborne v. Mobile. "

As we think that it is not *possible, under the Constitution of the United States*, that a telegraph message can be in part, "postal matter," and, in part "commerce." *within the right and proper application* of the powers of Congress for its regulation, we venture to ask a reconsideration of the expression in Deloup *vs.* The Port of Mobile, "that communication by telegraph *is commerce* as well as in the nature of postal service," (127 U. S., p. 645). It was not thought by the framers of the constitution that the power to regulate commerce among the States, was a sufficient power to support a postal system, at least within the States.

So, whatever may be the physical characteristics of mail matter, the power to protect it, and to regulate its transmission is found in he express power of Congress to create and regulate a postal system.

Mail matter is not "commerce among the States," nor is it commerce in any other accurate legal sense. When goods become mail matter, the laws of commerce, as to their carriage and delivery, and the care of them, while in transit, cease to apply to them.

To give to mail matter only the protection that commerce is entitled to, is to leave it exposed to State power, within State limits. To give to commerce the protection due to mail matter, is to enlarge the powers of Congress, by implication, beyond all recognized limits. In contemplation of law as it is written in the constitution, it is respectfully submitted, nothing can be mail matter and commerce at the same time. Mail matter is only such, while it is in the custody of the United States.

The government is the custodian, but, in no sense, the owner, of a package of goods sent by mail. It has no such property in the goods as a commercial carrier has. The carrier, on a general or special bailment, is custodian and special owner of property entrusted to him. The laws regulate his conduct, but do not usurp his functions, or make him the agent, or servant of the government. He conducts "commerce," while the United States regulates it, but, the Federal Government conducts postal transportation.

The words " commerce among the States " had a clear and settled meaning, when the constitution was adopted, in reference to which these words were selected.

At that time, "inter-state commerce" consisted of the movements, intercourse and dealings of people of the States with each other, and the interchange and transportation of property, back and forth, across State lines. Commerce in property, was such trafic and transportation as could be entrusted to a carrier, and for the safety and delivery of which he could be held responsible. In so far as letters and other mailable matter was concerned, they were taken into government control and their safe and speedy transportation was provided for *in the constitution*, through a national postal system.

The right to carry such matter, whether, or not, it is property, was expressly conferred on the United States, and equally, the right to prohibit others from carrying such matter, for a reward, and to regulate its carriage, was reserved to the United States.

The power to regulate commerce among the States was not looked to, as a support for the right to carry the the mail. That was given as a distinct power for an entirely different purpose.

The new methods of communication by telegraph, telephone, and signals, belong naturally to the classification of postal matter, and postal transportation, rather than to that of commerce.

The government may, at any time, adopt these means of communication, as postal facilities, and employ them in States. *In doing this the United States would not be regulating commerce within the States*, for the simple reason that neither the wires of a telegraph company, nor the messages that pass along them, are commerce.

If the messages are not commerce, the gross receipts of the company that sends them are not commerce, and Alabama has not assumed to control inter-state commerce in taxing such earnings. Commerce among the States, cannot be conducted without the use of money. Yet, the States may tax money that is in the hands of any citizen, on a day stated, although he may be then ready to set out for New York to buy a stock of goods with it. People v. Commissioners, 104, U. S. R. 466.

It must be that *property* in some tangable form, is the "commerce" intended to be placed within the power of regulation by Congress, and that it must have been placed in condition for such uses, before the federal power of protection can attach to it, or else, all the moveable property in the States would escape taxation. It is not potential, or possible, inter-state commerce that is so protected, but actual commerce.

Neither is it the facilities for conducting, or promoting commerce, found in the States, that are within the federal regulation or protection, against the States power of taxation – such as corporations and their stocks, banks and bankinghouses, warehouses, elevators, cattle yards, railroads and their machinery, wagons, horses, farming tools, and all else that is employed in creating crops, products, and whatever may become inter-state commerce

The line of division must be drawn, somewhere, and a substantially clear definition must be given to the words "commerce among the States," or else the States will not be able to collect the taxes that are needed for their support.

In Louisiana, a certain lottery is substantially, a part of the State government. In selling tickets in other States and in distributing prizes, they conduct commerce. If Alabama chooses to license the agencies of Louisiana, and collect in advance, a heavy license tax, is that an unlawful burthen on the "business," and therefore, a tax on commerce? "Barnum's circus" is as much a commercial enterprise as is the meat distributing business of Armour. The circus is a great consumer of products, in many States. It circulates much money, and leaves the fruits of commerce in places that need them. Yet, all the States tax the business of Barnum, and, to that extent, restrict the inter-state commerce that he is engaged in. Every pawnbroker and dealer in old gold and silver, conducts inter-state commerce. If he could not get his metal, when he has melted it into bars, into the great marts of trade, he could do no business of account.

Every State taxes such business heavily and justly. The force of these illustrations is avoided by the assertion that these and like taxes may be levied under the authority of the police powers of the States. The question arises, however, can the States under their police powers, restrict a "commerce" that Congress, alone, can regulate?

The true answer is that a mere "business" is not "commerce" within the meaning of the Constitution of the United States, as to inter-state commerce, so as to prevent the States from asserting their sovereign power of domestic taxation upon it. The "police powers" so often spoken of, and so vaguely defined, are but the reserved powers of statehood, and they comprise that vast and necessary mass of sovereign powers that are not abridged by any grants of power to Congress, unless they are clear, distinct and determinated. The construction that must resort to inference and argument to abridge the taxing powers of the States has an unsafe foundation. The powers of the Federal Government, when in collision with the powers reserved to the States, are not of the same nature with its powers in dealing with foreign countries; though, in each case, the definitions of these powers are found in the same clause of the constitution.

When the States resolve, in their legislatures, that a tax on a "business," is necessary for the welfare of the people, they exercise "the police power." If, in so deciding, they resolve that publice justice and morals require the tax—as upon the "business" of making, or dealing in whiskey—Congress cannot interfere with that tax, even if the State has prohibited the sale of whiskey within its own limits, and has, thereby, confined the production to the purposes of inter-state, or foreign commerce.

Does "the police power," in such case, destroy the power of Congress to regulate inter-state commerce? It does not. But, the State power *to tax a business* is in full play, until that business has produced a commodity and that commodity becomes the subject of inter-state commerce through the act of its owner. Then Congress can protect it, if the word "regulate" includes, within the meaning of the constitution, the power to prohibit the States from taxing such property.

These matters have been much discussed and many of them decided, but, it is most respectfully submitted, that, the lines of demarkation between the taxing power of the States, over commerce and the agencies and instrumentalities of its creation and conduct, and the regulating power of the United States, are growing more indistinct. It is certain, however, that the abridgment of the taxing powers of the States has gone on at a rapid rate within 20 years, and is constantly increasing. There can be no policy more fatal to the States, or more burdensome to their people, than that of exempting from taxation, every corporation, or persons, whose "business" is connected in whole, or in part, with the people of other States.

There seems to be a clear ground for holding that telegraph and telephone companies are not transmitting "commerce," in sending messages they dispatch from one State to another, but they were transmitting postal matter, for a reward, and, that it is in the option of the United States, *when Congress chooses to act*, to regulate that service. Until Congress shall make such regulations *within* and *among* the States, the States may tax these companies, because they give to them their charters, their licenses and privileges, their rights of way, the protection of their property through penal laws, and, indeed, all the real protection they have in their business.

The Supreme Court of Alabama, did not consider, or decide the question, whether the attitude of this telegraph company towards the United States exempted its gross earnings from taxation, on the ground that it furnished postal facilities to the government.

It is to be regretted that the State tribunal, whose judgment is brought in question, by this writ or error, did not state the grounds on which it attempted to vindicate the action of the legislature in the effort to collect taxes from a great corporation, on the point just stated. Probably it was not argued in that court. The case of Deloup v. Mobile, 135 U. 5. 640, was a license tax, fortified by a penalty for doing business without a license That was the case that was decided. It was not in principle like this case, which taxes the "gross receipts" of a telegraph company—its "income" from its business often it is collected, in the 15th section of the act of February 17, 1885.

A license tax, having little or no relation to the value of the business to be done, is based on the idea of the right of the State to forbid the telegraph from being operated within its borders. While a tax on gross receipts, must await their being received, and is based on the idea of encourageing telegraphing in the State.

Alabama can tax national bank notes in the possession of any citizen, on a given day. If those notes were the fruits of coupons clipped from United States bonds, the power to tax them would be the same. Those notes may be the entire gross receipts of the holder, from the only business he has--that of cutting coupons from government bonds and collecting or selling them. Money received, as gross receipts from any business, is still money, and cannot have, under our system of equal burdens and privileges, an exemption from taxation that is not equally due to all mere money.

A mail contractor, who lives in Alabama, and carries a horse mail from a village in that State to one in Georgia, is, certainly, an agent of the government, and his horse is a postal facility. The man must, notwithstanding, pay a poll tax on his own head and a tax on his horse and saddle. This tax lessens his ability to perform his contract, and might prevent him entirely from carrying the mail. Is he exempt from State taxation on his poll and property, because both are employed in the mail service?

In our dual relations to the States and the United States, as citizens, much care is required, often, to adjust the claims of each, upon the person who is citizen of both governments. The States have a right, almost unlimited, to require their citizens to contribute to the support of their home governments.

The policy of the Federal Government should not be such as to indulge intendments and presumptions, in order to relieve the citizen of the duty of supporting the State government, when there is no real conflict in the duties exacted of him by the respective governments.

It is a very dangerous policy and should not be observed, except in cases of actual conflict of duties. A better illustration of this fact could not be found than is presented in the Western Union Telegraph Company. It has immense wealth, ard a business so thoroughly established that, even the United States could not, under fair competition, break down its income. It has a lodgment in every State of the Union, acquired by concessions, attended with the right of the States, long exercised, to tax its property. If it is free from taxation that other companies and other persons must pay, it is, to that extent, as it is, indeed, to every extent, a practical monopoly. The actual situation is bad enough, and dangerous enough as it is, and, mere theory, or presumption, should not be set up, or indulged, to make it worse. The theory is that the States cannot tax the Western Union Telegraph Company on its income or gross receipts, because it has *accepted a relation* to the United States, under which it gains the right of way through the public lands; the right of pre-emption for stations, etc.; the right to cross navigable waters; and the right to sell its property to the United States, and the right of Federal protection in the States, and the right to exemption from such taxes as every local corporation and citizen is bound to pay. The relation to the United States, for which all this is conceded to that company, is simply a contract that government messages over the wires shall have precedence, as to the time of sending them, over private, or State messages, "at such rates as the Postmaster General shall annually fix." The penalty for refusing to send messages at such rates is simply that they shall not be paid for. The reply of the company to that claim of forfeiture, as recent history proves, is, *that the government must pay for the message before it is sent.* Now, it is respectfully submittted, such a "postal facility" does not make of this company a part of the postal system of the United States, nor does it convert this company into a servant of the U. S. Government. To indulge such a presumption, and, on that basis to shelter its "gross receipts" against State taxation, is to reverse fact and history, in order to save a theory, or presumption, and to strike down an essential power of State government, in order to exempt from all taxation a recalcitrant employe′ of the government.

Before July 1866, this company was liable to State taxation, unless the commerce clauses of the constitution protected it against the taxing power of the State. Then Congress essayed to give it a place in our postal system as a special employe′, and this is now claimed as a protection against the taxing power of the States as to its gross receipts, income, etc., etc. Congress, in adopting the telegraph companies, as the postal agents of the government, has fully and cleary expressed its will and has given *the full measure and shape* to this new relation *that was intended to be given.* Congress has left nothing to inference, intendment, or presumption in this matter.

Sections 5263 to 5269 (inclusive) of the Revised Statutes express fully the will of Congress.

They do not make of the telegraph companies *postal* agents. They do not require these employes to do anything in the nature of postal service *for the people*, and a postal service that is not for the use and benefit of the people, has no place in the thought that gave to Congress the power to establish post offices and post roads.

"Telegrams * * * * in their transmission * * * * shall have priority over all other business at such rates as the Postmaster General shall annually fix," if they are government telegrams. This is all the *postal service* that is required of the companies that accept certain grants from the goverment. A postal system that required only that much service from a railroad company, a stage coach proprietor, a horse mail, or a foot messenger, would scarcely be called a "postal service."

When Congress has in fact, (as it may do), adopted the telegraphs as the transmitters of postal communications, it will be time to presume everything that shall be found necessary to complete and sustain that resolution. But that purpose has not been indicated; certainly it has not been consummated in anything that Congress has yet done. The reverse is true. For Congress has gone no further than to require a priority in the sending of government messages and has paid for that *privilege* in certain important grants and concessions to such companies.

Such a priority in the use of the mails, if it is legitimate, would arise under the postal system from the will of Congress, and not from a bargain with a mail contractor.

It seems, indeed, that it was foreign to the thought in which these laws (§§ 5263 to 5269, Rev. Stat.) originated that Congress was, by those enactments, incorporating into the postal service of the United States these telegraph companies.

JNO. T. MORGAN,
*Attorney for Defendants in Error.*

# Motion to Advance.

## SUPREME COURT OF UNITED STATES.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiffs in error,

v.

THE STATE BOARD OF ASSESSMENT, Defendants in error.

ERROR TO SUPREME COURT OF ALABAMA.

BRIEF OF T. N. McCLELLAN, Attorney-General of Alabama.

*For Defendants in Error.*

This motion is predicated upon that clause of Section 649 of the Revised Statutes which (eliminating its alternati[illegible]) provides that "when a State is a party * * * * such State * * * * shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed in preference to any civil cause pending in such court between private parties." The plaintiff in error joins in the motion.

It will be seen that the name of the State of Alabama is not set down as a party on the record, and if there is any difficulty in the way of the motion this is it. I submit that the object of the statute was to prevent the embarrassment of the operations of State governments by the indefinite pendency in this court of causes which have the effect of deranging and embarrassing the governmental functions of the States. This object can best be subserved by a construction of the statute with reference to it, and by holding that the record will be looked to by the court to ascertain whether the State is the party really in interest, and it will in many instances be entirely defeated by holding that the "party" contemplated by the Act means the party nominally on the record, however devoid of interest that party may be, and however great and urgent may be the interest of the State behind the figurehead. The most cursory examination of the record here will demonstrate that neither the State Board of Assessment of Alabama as an organization or the Executive Officers of the State who compose that Board, individually, have the slightest interest in the matter in controversy, and that the entire interest involved is in the State on the one hand and in the plaintiff in error on the other. These officers, not by name, but by designation of office are constituted by statute a board to sit in judgment on the returns of certain classes of property for taxation and to determine between the taxpayer and the State what is a fair valuation of the property so returned, and to this end the board is empowered to take testimony and examine witnesses, and is required to keep a record of its proceedings and findings.

Acts of Alabama 1884-85 pp. 26-27, Section 13. So far from having any interest, absolute disinterestedness is an essential constituent of the board. This court has held that, on this character of motion, in a case like this, it will "open the record and ascertain" who is the real party in interest. Miller v. State, 12 Wall. 162.

I have proceeded thus far upon the idea that the members of the board are necessary nominal parties to this case. I now take the position that they are not necessarry parties at all. The board, as shown above, acted as and was a *quasi* court, vested with judicial powers, authorized to hear testimony, and required to keep a record of its proceedings and its conclusions. The matter judicially passed upon by it, so far as its action is involved here, was whether the State of Alabama, by way of taxation, should recover a certain *per centum* of the gross receipts of the plaintiff in error, and the amount of that recovery measured by the sum of such receipts. The *essential and only* parties to that proceeding, resulting in the adjudication here complained of, were the State of Alabama on the one side and the Western Union Telegraph Company on the other. The State was represented by its Attorney-General; the Western Union Telegraph Company was represented by its counsel here, as the record shows, and as the law provides. Had there been a provision in the laws of Alabama, as in most States, for an *appeal* from this adjudication, the case would have been styled in the appellate State courts, and here, "The Western Union Telegraph Company v. The State of Alabama." No appeal is provided, however, and *certiorari* was resorted to. This is nothing more or less than a writ of error. This writ was directed to the members of the board, not that they had any interest, but because it was their duty to certify the record. This was and is the sole office the board had or has to perform in this case: to send up the record of its proceedings on a matter adjudicated before and by it between two parties litigant. And without any reason therefor, it would seem, except convenience—for while the State can not be made a defendant in a suit, there is no legal objection to making it a defendant in error, or an appellee—the style of the case was changed so that it stood on *certiorari* as against these officers. The record having been certified, there remains nothing whatever for this board or its members to do in this case, in any event. On *certiorari*, the final judgment is one of absolute affirmance or abatement of the proceedings reviewed. The inferior tribunal whose record is in question, can not be required to take further action, nor can its action be affirmed in part and reversed and remanded in part, or reversed and remanded as a whole. It is wholly affirmed, or it is wholly quashed. The State of Alabama, therefore, and the Western Union Telegraph Company are the only parties—not only in interest, not only upon the original record, but the only parties to be in any degree affected by the judgment of this court.

Camden v. Block, 65 Ala. 239.
McAllilly v. Horton, 75 Ala. 492.
2 Desty Taxation, 239.
Whitbeck v. Hendersonville, 50 Mich. 50.

This view of the case puts it on all-fours, as regards the point being discussed, with *Miller v. State, supra.* There, as here, the record showed that originally there was a real party in interest to the case, whose name had been omitted from the title of the case when it was carried into another court, and the court looked back into the record, and finding that that original party was not entitled to have the cause advanced, declined to advance it. Will it not look back into this record, and finding that the original and only party at the inception of the case, and only party now in interest, was and is a party entitled to have the cause advanced, order it heard under the statute? This record presents even a stronger case for the action invoked than *Miller v. State,* in that there the nominal party was a necessary party, and here the nominal party is an unnecessary party, as I have endeavored to show.
Miller v. State, 12 Wall. 159–162.

A similar question has been decided in the State from which their case comes in accordance with the views above expressed. A statute of Alabama provides that the State "may sue in its own name and is entitled to all remedies provided for the enforcement of rights between individuals without giving bond or security," &c., and under this Act it is held that an officer of the State who is sued in his official capacity and has no personal interest in the litigation may take an appeal from a judgment against him without giving the appeal bond required of all private parties, and the decision is put on the ground that the State is the real party to the suit.
Code of Ala., Sec. 2092.
Reynolds v. Blue, 47 Ala. 711.

Upon the assumption then that the State of Alabama will be held a party to this suit, I submit that the reasons given in the motion for the advancement of the cause, are, in the fullest sense, sufficient. Only one of these reasons need be referred to here. After the decision of this case in the State Supreme Court, the tax collectors in the several counties of the State, proceeded, as they had the right to do, to collect the tax. Payments were not voluntarily made by the Telegraph Company, but under protest accompanied by notice that suits would be instituted to recover back the amounts so paid. This action on the part of the company saves its right of action against these officers, a right which a reversal of this case here will perfect. The only protection of the collectors against this contingent liability is the retention of the taxes in their hands. But the statutes of the State do not admit of this being done. Under those statutes this money must, at all hazards, be paid into the treasury, and it is no defense to this liability that the officers are responsible for it to the Company. Any officer failing to pay it over subjects himself to suit and to summary deposition from office on the order of the governor.

Acts of Ala. 1884–5 pp. 47, 48, Secs. 73, 74, 75, 76, 77.
The State v. Lott, 69 Ala. 147.
Timberlake v. Brewer, 59 Ala. 108.
The State v. McBride, 76 Ala. 59.

This state of things deranges the accounts of the State with probably three-fourths of its tax collectors, produces great friction and embarrassment in the collection of the taxes, not only from this Company, but from all tax payers in the counties where this company is taxed, puts the State's agents in an antagonistic position to it, and is a difficulty which will be duplicated within the next month with reference to the taxes of 1886, and will be repeated annually while this case is pending in this court.

The other grounds of the motion are deemed amply sufficient to justify the order prayed and are respectfully insisted on.

The following are the more important sections of the revenue law of Alabama bearing on this matter.

SEC. 6. * * * * * * * * *

6. On the gross amount of the receipts by any and every telegraph, telephone, electric lights and express company derived from the business done by it in this State, at the rate of two dollars on the hundred dollars.

7. On the gross income of sleeping car companies, corporations or associations doing business or running or causing their cars to be run in this State, two per cent., exclusively for the use of the State.

SEC. 13. The governor as president, the secretary of state, the auditor and the treasurer of the State shall constitute a board for the assessment of the items of property of railroad companies returned to the auditor of the State, and a majority of such board shall constitute a quorum; such board shall meet at the office of the auditor annually, on the first Wednesday in May, and and if there should not be a majority of the board present at that time, the auditor shall immediately notify the governor of the fact, who shall appoint another day of meeting as early as practicable, which appointment shall be notified by the auditor to the other members of the board, and should any further failure to meet occur, the governor shall have power and is required to repeat the appointment until a meeting of a quorum is effected. When the said board has assembled as by this section required, they shall proceed to examine and pass upon the returns by the previous section required, and if no such returns have been received, then to consider and examine the values as assessed by the auditor, and decide upon the valuation to be charged for the purposes of taxation against said railroad companies on the property hereinbefore named; and in case no return has been made by or on behalf of any railroad companies, said board may add to the assessment which it may adopt a penalty of not more than fifty per cent. thereon.

If, at any meeting, the board should not have in its possession satisfactory data upon which to base an estimate of the value of the property with the assessment of which it is charged, or from any other cause, is not able to make or complete its assessment, it may adjourn for any interval of time which may in its opinion be requisite to accomplish its object, and it shall have power to call upon any officer of any railroad for any records, books or documents of any description, or for answers to any interrogatories which it may deem necessary to an intelligent discharge of its duties; and it shall also be empowered to require the attendance of any officer of any railroad, or any other person, when testimony of such persons may to it seem material in the case.

The valuation of the property of railroad companies shall proceed upon the same principles as the valuation of every other species of property; that is to say, the valuation of such property shall be had exclusively upon the consideration of what a clear fee simple title to such property would sell for under the conditions under which that character of property is most usually sold.

The attorney-general of the State shall be present at every meeting of the board to represent the interests of the State. It shall be his duty to assist the board with his advice, or otherwise, and to make such suggestions and representations to it, as he may deem advisable to protect the interests of the State.

The board shall keep a record of its proceedings, and when the members are equally divided upon any question, the attorney-general shall decide the point and in every case in which he dissents from the conclusion of the majority of the board he shall spread upon the records his reasons for such dissent. The absence of the attorney-general shall be sufficient ground for adjourning the session of the board. The minutes shall also show what members of the board were present.

Sec. 14. When said board shall have acted upon said assessments and decided upon the amount of value to be charged against said railroad companies respectively, the auditor of this State shall notify the assessors of each county through which said road runs of the number of miles of track and the value thereof, in his county, and the proportionate value of the property of said railroad company taxable in his county, to be entered in the book of assessments in his county in addition to other real property, fixtures, machinery, tools and other property belonging to said railroad company in his county, to be assessed as other property of like kind owned by private citizens of his county; Provided, that the auditor shall send to the superintendent of each railroad so assessed, by the board as aforesaid, copies of his notification as sent to the county assessors, of the railroad of which said superintendent has charge.

Sec. 15. The president, secretary, auditor or managing agent in this State, of every telegraph company whose line or any part thereof, is within this State, must annually, on or before the first day of April in each year, under oath make return to the auditor of the State of the number of miles of telegraph wire in this State belonging to it and the value thereof, the number of poles, batteries, instruments and articles of all